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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 360

PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,

vs.

ILLINOIS BRICK COMPANY

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT

PETITION FOR CERTIORARI FILED AUGUST 12, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN SUPREME COURT OF ILLINOIS

FEBRUARY TERM, A. D. 1934

ILLINOIS BRICK COMPANY, a Corporation, Appellee,

VS.

PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant

Appeal from Circuit Court, Cook County

Honorable John Prystalski, Judge Presiding

Abstract of Record

Placita.

Præcipe, filed December 31, 1924, in Case No. B-116212, trespass on the case upon promises.

Summons, issued December 31, 1924, in Case No. B-116212, trespass upon the case upon promises.

Præcipe, filed March 3, 1925, in Case No. B-118056, trespass on the case.

Summons, issued March 3, 1925, in Case No. B-118056, trespass on the case.

Declaration, filed March 3, 1925, in Case No. B-118056, trespass on the case. The allegations of this declaration are substantially the same as the allegations of the declaration in Case No. B-116212 hereinafter set forth.

[fol. 2] DECLARATION

Declaration, filed March 3, 1925, in Case No. B-116212, trespass on the case upon promises as follows:

Now comes Illinois Brick Company, a corporation, plaintiff, and respectfully represents unto this Honorable Court that heretofore and prior to the sixteenth day of April, A. D. 1924, plaintiff filed with the Illinois Commerce Commission its complaint against Pennsylvania Railroad Company, a corporation, and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, a corporation, defendants herein, and that thereafter, in January, 1923, plaintiff, by

leave of the Commission first had and obtained, thereafter filed its amended complaint, in words and figures as follows, to wit:

State of Illinois

Illinois Commerce Commission

Amended Complaint

Case No. —

File No. 12765

In the Matter of the Amended Complaint of ILLINOIS BRICK COMPANY, a Corporation,

against

PENNSYLVANIA RAILROAD COMPANY WESTERN LINES, and Pittsburgh, Cincinnati Chicago & St. Louis Railroad Company, as to Freight Charges Collected on Shipments of Common Brick from Bernice, Illinois, to Chicago, Illinois

To the Illinois Commerce Commission, Springfield, Illinois:

Now comes Illinois Brick Company, a corporation, complainant herein, and by leave of the Commission first had and obtained, files herein this, its amended complaint, as follows, to wit:

[fol. 3] The Complainant herein respectfully shows:

1. That the Illinois Brick Company is a corporation organized under and by virtue of the laws of the State of Illinois; that it has its principal place of business in the City of Chicago, State of Illinois, and is engaged in the business of manufacturing and selling common brick; that it has a number of yards or brick-making plants in and about the Chicago switching district as defined by Lowry Tariff I. P. U. C. 39), one at Dolton, Illinois, on the Indiana Harbor Belt Railroad, one at Blue Island, Illinois, on the Baltimore and Ohio Chicago Terminal Railroad and Grand Trunk Railroad, one at Blue Island, Illinois, on the Chicago, Rock Island and Pacific Railway, one at Weber, Illinois, on the Chicago and Northwestern Railroad, all in the Chicago switching district; one at Shermerville, Illi-

nois, on the Chicago, Milwaukee and St. Paul Railway, one at Bernice, Illinois, on the Pennsylvania Railroad Western Lines, one at Bernice, Illinois, on the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad; the last three plants are a short distance outside the Chicago switching district, the one at the greatest distance being about nine miles.

2. That the post office address of the complainant is No. 111 West Washington Street, Chicago, Illinois.

3. That Pennsylvania Rairoad Company Western Lines, and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, respondents herein, and each of them, are public utilities, and are common carriers engaged in the transportation of passengers and property wholly by railroad, between points (among others) in the State of Illinois, and [fol. 4] as such public utilities and common carriers, said respondent and each of them are subject to the provisions of an act to provide for the regulation of public utilities, and an act concerning public utilities.

4. That the post office address of the respondents, and each of them, is No. 323 South Wells Street, Chicago, Illinois.

5. That the rate of seventy cents per ton charged on common brick carloads from March 1, 1920 to August 26, 1920, as named in Pennsylvania Railroad Company Western Lines tariff, I. P. U. C. F. 283, and the rate of seventy cents per ton charged on common brick carloads from March 1, 1920 to August 26, 1920, as named in P. C. C. & St. L. Tariff, I. P. U. C. P. 364, and the rate of 93½ cents per ton, charged on common brick carloads from August 26, 1920 to November 27, 1920, as named in Pennsylvania Railroad Company Western Lines tariff, supplement 7, to I. P. U. C., P. 283, effective August 26, 1920, from Bernice, Illinois, to stations in Chicago and intermediate points on the Pennsylvania Railroad, and the rate of 93½ cents per ton charged on common brick carloads as named in the P. C. C. & St. L. R. R. Tariff, Supplement 3 to I. P. U. C. P. 364, effective August 26, 1920, from Bernice to stations in Chicago and intermediate points on the P. C. C. & St. L. R. R. and Pennsylvania R. R. and the rate of 94½ cents per ton, charged on common brick carloads from November 28, 1920, to February 18, 1921, as named in Pennsylvania Railroad

Company Western Lines Tariff, Supplement No. 8, to I. P. U. C., F. 283, effective November 28, 1920, from Bernice, Illinois, to stations in Chicago and intermediate points on the Pennsylvania Railroad, and the rate of 94½ cents [fol. 5] per ton, charged on common brick carloads from November 22, 1920, to February 16, 1921, as named in P. C. C. & St. L. R. R. Tariff Supplement No. 5½ to I. P. U. C., P. 364, effective November 28, 1920, from Bernice, Illinois, to stations in Chicago and intermediate points on the P. C. C. & St. L. R. R. and Pennsylvania R. R., and the rate of 95 cents per ton charged on common brick carloads from February 19, 1921, to February 15, 1922, as named in Pennsylvania Railroad Western Lines Tariff Supplement No. 9 to I. P. U. C., F. 283, effective February 19, 1921, from Bernice, Illinois to stations in Chicago and intermediate points on the Pennsylvania Railroad, and the rate of 98 cents per ton charged on common brick carloads from February 19, 1921, to February 15, 1922, as named in P. C. C. & St. L. R. R. Tariff Supplement 8 to I. P. U. C., P. 364,* effective February 19, 1921, from Bernice, Illinois. to stations in Chicago and intermediate points on the P. C. C. & St. L. R. R. and Pennsylvania R. R. were unjust, unreasonable, unjustly discriminatory, and unduly prejudicial and preferential, and in violation of Sections 32 and 38 of an Act to Provide for the Regulation of Public Utilities, approved June 30, 1913, in force January 1, 1914, and Sections 32 and 38 of an Act Concerning Public Utilities, approved June 29, 1921, in force July 1, 1921.

(Rates are in cents per net ton.)

6. Prior to June 25, 1918, the rate on common brick from all brickyards located at points in the Chicago switching district, namely, Weber, Illinois, on the C. & N. W. R. R., [fol. 6] Blue Island, Illinois, on the B. & O. C. T. R. R., Grand Trunk R. R., and C. R. I. & P. Ry.; and Indiana Harbor Belt R. R., Riverdale, Illinois, on the B. & O. C. T. R. R., and Dolton, Illinois, on the I. H. B. R. R., to industries and team tracks in Chicago and intermediate points on their

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* The rate of 98 cents via both lines and later published in I. P. U. C., F. 307, effective July 15, 1921, via the Pennsylvania R. R., and by the P. C. C. & St. L. R. R., in Supplement No. 4, I. P. U. C., F. 307, effective December 1, 1921.

own lines was 25 cents; that was also the rate from Bernice, Illinois, via the Pennsylvania R. R. and P. C. C. & St. L. R. R., to industries and team tracks on these roads. The Directors General issued General Order No. 28, effective June 25, 1918, advancing freight rates generally 25 per cent except a few commodities, which were advanced specific amounts in cents per hundred pounds, irrespective of the measure of the previous rate. Brick (except glazed or enamel) was advanced 2 cents per 100 pounds, or forty cents per ton. General Order No. 28 also carried rules for the disposition of fractions, so that the 25 cent rate on common brick named above was advanced to seventy cents. Had the 25-cent rate been advanced 25 per cent as was done generally under Order 28, the new rate would have been thirty cents, whereas it was made seventy cents, so that the effect of General Order No. 28 on the rates on common brick from the brick plants named in paragraph "1" was not only an advance of twenty-five per cent, but an additional advance of two cents per 100 pounds, or forty cents per ton.

Freight Rate Authority 1887 issued October, 1918, corrected this discrimination on the rates from brickyards in the Chicago switching district by authorizing an advance of 25 per cent in the rates in effect June 24, 1918, in lieu of the 2 cent advance under General Order 28, thus reducing the rate of seventy cents to thirty cents; but it left the rate [fol. 7] from Bernice to points within the Chicago switching district at seventy cents per ton.

Pursuant to the order to the I. C. C. in Ex Parte 74, the 70-cent rate from Bernice was increased by 33⅓ per cent to 93½ cents, and the thirty-cent rate from points of origin within the Chicago switching district became forty cents, both increases taking effect August 26, 1920.

Effective November 28, 1920, pursuant to a supplement of the Illinois Public Utilities Commission in Case 10620, the 33⅓ per cent increase was replaced by an increase of 35 per cent, making the rate from Bernice, 94½ cents per ton, and the rate from Chicago switching district points forty cents and forty and one-half cents per ton.

Under order of the Interstate Commerce Commission in Docket 11703, the 35 per cent increase was replaced by an increase of 40 per cent, making the Bernice rate 98 cents per ton, and the Chicago district 40 and 42 cents per ton.

These rates remained in effect until February 16, 1922, when the 98-cent rate from Bernice was reduced to fifty cents per ton, and the forty and forty-two cent rates from Chicago district points were increased by the Indiana Harbor Belt R. R. and the B. & O. C. T. R. R., to fifty cents per ton.

The rates on common brick from Bernice, Illinois to Chicago, had always been on the same basis as the rates from the plants located in the Chicago switching district. When F. R. A. 1887 was issued, complainants requested the defendants to restore the relationship in common brick rates by putting in the thirty-cent rate from Bernice to Chicago. The Pennsylvania R. R. Western Lines and the P. C. C. & St. L. R. R. made application to the proper freight traffic [fol. 8] committee for authority to publish the thirty-cent rate. This application was approved by the various freight traffic committees, but was not approved by Mr. Chambers, director of traffic.

These facts show that the rate relationship between Bernice, on one hand, and Dolton, Riverdale, Blue Island and Weber on the other, was destroyed, thus putting an undue burden on shipments of common brick from Bernice to Chicago.

The greater part of the output of the common brick yards in and near the Chicago district is shipped to Chicago. The yards at Bernice were built to compete in the Chicago market with the yards in the Chicago switching district. To enable them to do this the carriers put in the same rates and agreed to maintain such parity on common brick, between Bernice and yards in the switching district to Chicago.

Moreover, common brick is a low-grade commodity and moves comparatively short distances, so that in order to operate the plants of complainants located at Bernice economically, it is necessary to ship a large percentage of the output to Chicago. During the years 1914 to 1918, inclusive, an average of 85 per cent of the total shipments from the plants at Bernice were shipments into the Chicago switching district.

The principal inbound shipments at the brick plants are coal and fuel oil carloads and the same rates on these commodities apply to Bernice, as apply to the plants in the Chicago switching district. The wages paid are the same

at all brick yards named in this complaint. The brick made at Bernice is sold in Chicago at the same price as is the brick made at plants located at Dolton, Riverdale, Blue [fol. 9] Island and Weber. The rates of 70 cents, 93½ cents, 94½ cents, and 98 cents, charged by respondents on common brick carloads from Bernice to points in the Chicago switching district from March 1, 1920, to February 15, 1922, inclusive, were unreasonable and unjustly discriminatory and unduly prejudicial against the brick plants at Bernice, and in favor of the brick plants at Dolton, Riverdale, Blue Island and Weber, by amounts varying from 40 cents per ton, which is 80 cents per thousand brick; to 56 cents per ton, or $1.16 per thousand brick.

7. Your petitioners further respectfully represent that from March 1, 1920, to February 16, 1922, they have made shipments of common brick carloads from Bernice to Chicago and intermediate points and that the carriers hereinabove named have charged, demanded, collected and *and* received from your petitioner compensation at the rates of 70, 93½, 94½ and 98 cents per ton, as will more fully and completely appear from the statement to be made and the paid freight bills ready to be produced before this Commission.

That by reason of the facts stated in the foregoing paragraphs, complainant has been subjected to the payment of rates for transportation which were, when enacted and when collected, unjust and unreasonable, and in violation of Section 32 of an Act to Provide for the Regulation of Public Utilities, and Section 32, of an Act Concerning Public Utilities; unjustly discriminatory and unduly preferential and prejudicial in violation of Section 38 of the Act to Provide for the regulation of Public Utilities, and Section 38 of an Act concerning Public Utilities.

8. Wherefore, complainant prays that the respondents [fol. 10] and each of them may be required to answer the charges herein; that upon a final hearing hereof the Commission will order the said respondents and each of them to make due reparation to the complainant for the unlawful charges hereinbefore alleged to have been collected by the respondents and each of them, based upon the difference between the rates charged of 70 cents, 93½ cents, 94½ cents, and 98 cents per ton, and the rate of 40 cents per

ton, or such other sum as, in view of the evidence to be adduced herein, the Commission will determine that the complainant is entitled to, together with interest at the legal rate from the date of payments of such unreasonable, excessive, unjustly discriminatory and unduly preferential rates, and that the Commission will make such further order in the premises as may seem meet.

Dated at Chicago, Illinois, this — day of January, A. D. 1923.

Illinois Brick Company, (Signed) by Felsenthal, Struckmann & Berger, Attorneys. Felsenthal, Struckmann & Berger, Attorneys for Illinois Brick Company. (Signed) A. R. Miller, of Counsel, 69 West Washington Street, Chicago, Ill. (Signed) W. R. Allison, Traffic Manager, Illinois Brick Co., 111 W. Washington St., Chicago, Ill.

[fol. 11] Plaintiff further alleges that thereafter the said amended complaint of this petitioner and the answer of the defendants thereto came on for hearing before the said Illinois Commerce Commission, and that the said Illinois Commerce Commission heard the testimony of witnesses and examined the written briefs of the parties thereto thereafter filed with the said Commission, and on, to wit: the sixteenth day of April, A. D. 1924, the said Illinois Commerce Commission entered its order in words and figures as follows, to wit:

State of Illinois

Illinois Commerce Commission

1st Supplement 12765

Illinois Brick Company

vs.

Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company

Order

By the Commission:

It appearing that on November 7, 1923, the Commission entered its report, findings and order in the above entitled

proceeding which is hereby referred to and made a part hereof, under which order the Commission reserved jurisdiction of the subject matter and of the parties for the purpose of entering an order awarding reparation for charges collected in excess of the rates found to be just and reasonable in said order, and

It further appearing that this proceeding now comes on [fol. 12] for further consideration on the question of reparation. A statement certified to by the auditor of the Pennsylvania Railroad Company showing amount of reparation due under the aforesaid order and findings of the Commission entered November 7, 1923, has been filed which shows the amount of reparation due to be $28,965.72. The amount of reparation due is stipulated to be the amount due under the aforesaid order and findings of the Commission in the said order of November 7, 1923, and we accordingly find that the complainant is entitled to an award of reparation in the amount of $28,965.72 and interest at the legal rate from the date of payment for excessive freight charges collected on shipments transported by the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (now Pennsylvania Railroad Company), from Bernice, Illinois to points within the Chicago switching district, during the period October 28, 1920, to February 15, 1922.

It is therefore ordered that the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (now Pennsylvania Railroad Company), be, and they are hereby authorized and directed to pay to the complainant on or before May 1, 1924, $28,965.72 and interest thereon at the legal rate from date of payment as reparation on account of unreasonable rates charged and charges exacted for the transportation of common brick between the aforesaid points in accordance with the findings expressed in the order of November 7, 1923, Docket 12765 and the order and findings expressed herein. [fol. 13] By order of the Commission at Springfield, Illinois, this 16th day of April, 1924.

(Signed) Julius Johnson, Secretary. (Seal.)

Plaintiff further alleges that the defendants herein and each of them have wholly failed to comply with the aforesaid order of the Illinois Commerce Commission for the

payment to the plaintiff of reparation in the amount of twenty-eight thousand nine hundred sixty-five and 72/100 dollars ($28,965.72) and interest thereon, but have refused and still refuse to pay the said sum of money or any part thereof.

Plaintiff further alleges that the matters and each of them set forth by this plaintiff in the aforesaid amended complaint were true, and that the said rates of 70 cents, 93½ cents, 94½ cents and 98 cents per ton, charged, demanded, collected and received by the defendants from this plaintiff upon the shipments of common brick in carloads from Bernice, Illinois to Chicago and intermediate points located within the Chicago switching district were and each of them was unjust, unreasonable, and in violation of Section 38 of an act passed by the Legislature of the State of Illinois, entitled, "An Act to Provide for the Regulation of Public Utilities, in force January 1, 1914", and in violation of Section 32 of an act passed by the Legislature of the State of Illinois, entitled, "An Act Concerning Public Utilities, in force July 1, 1921"; and that said rates were and each of them was unjustly discriminatory and unduly preferential and prejudicial, in violation of Section 38 of an act passed by the Legislature of the State of Illinois, entitled, "An Act to Provide for the Regulation of Public [fol. 14] Utilities, in force January 1, 1914," and in violation of Section 38 of an act passed by the Legislature of the State of Illinois, entitled, "An Act Concerning Public Utilities, in force July 1, 1921"; that the plaintiff made shipments of common brick from Bernice, Illinois to Chicago and intermediate points under the aforesaid rates, and each of them, and paid the freight charges thereon demanded by the defendants while such rates and each of them were in force, and that the plaintiff itself bore the entire expense of the said freight charges without reimbursement from any other sources, and that the plaintiff was damaged by reason of the enforcement and collection by the defendants and each of them of said unjust, unreasonable, unjustly discriminatory and unduly preferential and prejudicial rates.

Plaintiff further alleges that it has expended and has incurred a liability to expend large sum of money for costs and attorneys' fees in and about the preparation of the complaint and amended complaint before the Illinois Com-

merce Commission and in the trial of said cause before the Illinois Commerce Commission, and in the filing of this cause of action in this Honorable Court, and will become obligated in the future to pay other large sums of money for court costs, expenses and attorneys' fees in and about the prosecution of the above entitled cause, and that the plaintiff is entitled to be reimbursed therefor by the defendants and each of them under and by virtue of Section 72 of Chapter 111A of the statutes of the State of Illinois being an Act passed by the Legislature of the State of Illinois, entitled, "An Act Concerning Public Utilities, approved June 29, 1921, in force July 1, 1921."

[fol. 15] Plaintiff further alleges that the failure of the defendants and each of them to comply with the said order of the Illinois Commerce Commission, dated April 16, 1924, for the payment of the said sum of twenty-eight thousand nine hundred sixty-five and 72/100 dollars ($28,965.72) and interest as reparation was willful, and that this plaintiff is entitled, and makes claim for punitive damages under and by virtue of Section 72 of Chapter 111A of the statutes of the State of Illinois, being an act passed by the Legislature of the State of Illinois, entitled, "An Act Concerning Public Utilities, approved June 29, 1921, in force July 1, 1921."

Wherefore plaintiff alleges it is damaged in the sum of one hundred thousand dollars ($100,000), and therefore it brings this suit, etc.

Felsenthal, Struckmann & Berger, Attorneys for Plaintiff.

Pleas of Defendant

Pleas of defendant, filed March 16, 1925, as follows: First plea is nonassumpsit. Second plea is not guilty. Third plea is to the effect that the defendant does not owe the sum of money demanded or any part thereof in manner or form as the plaintiff has complained against it. Fourth plea is a notice of special defenses and is as follows: That said defendants hereby give notice in writing under the foregoing pleas of the general issue that in addition to all other defenses open to them under said pleas they intend to rely upon the following special matters for a defense on the trial: That before the filing with Illinois Commerce

Commission of the complaint and amended complaint in plaintiff's declaration mentioned, the plaintiff had filed with Interstate Commerce Commission a complaint involving the [fol. 16] same rates, said complaint being designated as No. 11317; that Interstate Commerce Commission, after due hearing, found that said rates were not unreasonable and denied plaintiff reparation; that the order of Illinois Commerce Commission in plaintiff's declaration mentioned is erroneous in that it awarded reparation on movements during the so-called guaranty under Transportation Act, 1920, being the period from March 1, 1920, to September 1, 1920; that said order was also erroneous in that it awarded reparation on movements during the period when Illinois Commerce Commission and others were restrained by order of the federal courts from changing or interfering with the rates of carriers, including said defendants; that said proceedings before Illinois Commerce Commission in plaintiff's declaration mentioned were erroneous in that plaintiff was permitted to amend its complaint at the date of the hearing and to enlarge the issues by the inclusion therein of shipments which moved during a period not contemplated in the original complaint; that prior to April 18, 1922, said rates were published and collected by said defendant pursuant and in obedience to an order entered January 11, 1921, by Interstate Commerce Commission in the proceeding designated as No. 11703 in which said Commission found it was necessary and ordered said defendants to publish and collect said rates in order to remove undue prejudice, preference, and advantage, and unjust discrimination found by said Commission then to exist in the relationship of the corresponding interstate and intrastate rates and charges; that said order of January 11, 1921, was vacated by Interstate Commerce Commission on or about April 18, 1922, because and only because Illinois Commerce Commission [fol. 17] had on or about March 16, 1922, approved and continued in effect said rates and charges as the lawful, established, and applicable intrastate rates and charges for the State of Illinois; that Illinois Commerce Commission is without jurisdiction or authority to penalize said defendants or to award damages or reparation against them for their said acts pursuant and in obedience to said order of Interstate Commerce Commission and that this court is likewise without such jurisdiction and authority; that the

said rates in plaintiff's declaration and in its said amended complaint mentioned were not, when enacted and collected, unjust and unreasonable and in violation of Sections 32 of said Illinois statutes respectively and unjustly discriminatory and unduly preferential and prejudicial, in violation of Sections 38 of said statutes respectively; that the plaintiff is not entitled to the amount of reparation awarded by Illinois Commerce Commission in said proceedings or to any part thereof.

Plea of the defendant, filed March 16, 1925, in Case No. B-118056, trespass on the case, to the effect that Case No. B-116212 is pending involving the same issues and praying judgment on the writ in this suit and that the same may be quashed.

Præcipe, filed April 13, 1925, in suit No. B-119310, in debt.

Summons, issued April 13, 1925, in suit No. B-119310, in debt.

Declaration, filed April 13, 1925, in suit No. B-119310, in debt, the allegations of which are substantially the same as the allegations of the declaration in suit No. B-116212, hereinbefore set forth.

Plea, filed April 30, 1925, in suit No. B-119310, debt, to [fol. 18] the effect that the issues in this suit are substantially the same as the issues in suit No. B-116212 and in suit No. B-118056, and praying judgment on the writ and that the same may be quashed.

STIPULATION SUBSTITUTING ATTORNEYS

Stipulation, filed April 29, 1933, that Messrs. Markheim & Allie may be substituted as attorneys for the plaintiff in place and instead of Felsenthal, Struckmann & Berger.

STIPULATION AS TO CONSOLIDATION

Stipulation, filed April 29, 1933, that the causes now pending in this court entitled Illinois Brick Company, a corporation, plaintiff, versus Pennsylvania Railroad Company, a corporation, and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, a corporation, defendants, bearing general numbers B-116212, B-119310, and B-118056, may be consolidated and tried together.

ORDER WAIVING JURY TRIAL, ETC.

Order entered October 18, 1933, to the effect that on the agreement of the parties it is ordered that the right to a trial by jury be and the same is hereby waived and on a like agreement the cause is submitted to the court for trial.

JUDGMENT

Judgment order, December 5, 1933, entitled, In the Consolidated Cases B-116212, B-118056, and B-119310, wherein it is provided that the said consolidated cases be dismissed as to the defendant, Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; that the court finds the issues on said consolidated cases in favor of the plaintiff and against the defendant and assesses plaintiff's damages at the sum of $28,673.02, together with interest thereon at the rate of five per cent per annum from May 1, 1924, to the present date, which interest amounts to $13,755.07, making a total of $42,428.09; that plaintiff is entitled to be allowed [fol. 19] a reasonable attorney's fees to be taxed and collected as part of the costs of the action; that the sum of $2,000 is a reasonable attorney's fees for the plaintiff in said cases; that the sum of $2,000 is hereby taxed as part of the plaintiff's costs of the action; that defendant moved in arrest of judgment and said motion was overruled; that plaintiff have and recover of and from the defendant, Pennsylvania Railroad Company its damages in the sum of $42,428.09, together with plaintiff's costs and charges including said sum of $2,000 taxed as part of plaintiff's costs of the action and that plaintiff have execution; that defendant prays an appeal from said judgment to the Supreme Court of Illinois which is allowed upon the filing of an appeal bond in the sum of $50,000 within ninety days and ninety days is given for a bill of exceptions.

Bill of Exceptions

Bill of exceptions, filed December 30, 1933, as follows:

Be it remembered that on October 18, 1933, the consolidated cases came on for hearing before the Honorable John

Prystalski, a jury having been waived, whereupon the following testimony was offered and proceedings had:

Present:

Messrs. Markheim & Allie by Mr. A. R. Miller, representing plaintiff.

Messrs. Loesch, Scofield, Loesch & Burke, by Mr. Edward M. Burke, representing defendants.

[fol. 20] Plaintiff's Evidence Before the Court

Plaintiff's Exhibit 1, being a certified copy of the complete record in the case of Illinois Brick Company versus Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company before the Illinois Commerce Commission, Case No. 12765, offered and received in evidence and was as follows:

Plaintiff's Exhibit 1

The original petition or complaint of the Illinois Brick Company filed before the Illinois Commerce Commission October 28, 1922, is as follows:

COMPLAINT

The complainant herein respectfully shows:

1. That the Illinois Brick Company is a corporation organized under and by virtue of the laws of the State of Illinois; that it has its principal place of business in the City of Chicago, State of Illinois, and is engaged in the business of manufacturing and selling common brick; that it has a number of yards or brick-making plants in and about the Chicago switching district (as defined by Lowry Tariff I. P. U. C. 39), one at Dolton, Illinois, on the Indiana Harbor Belt Railroad, one at Blue Island, Illinois, on the Baltimore and Ohio Chicago Terminal Railroad and Grant Trunk Railroad, one at Blue Island, Illinois, on the Chicago, Rock Island and Pacific Railway, one at Weber, Illinois, on the Chicago and North Western Railroad, all in the Chicago switching district; one at Shermerville, Illinois, on the Chicago, Milwaukee and St. Paul Railway, one at Bernice, Illinois, on the Pennsylvania Railroad Western

Lines, one at Bernice, Illinois, on the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad; the last three plants are a short distance outside the Chicago switching district, [fol. 21] the one at the greatest distance being about nine miles.

2. That the post office address of complainant is No. 111 West Washington street, Chicago, Illinois.

3. That Pennsylvania Railroad Company Western Lines, and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, respondents herein, and each of them, are public utilities, and are common carriers engaged in the transportation of passengers and property wholly by railroad, between points (among others) in the State of Illinois, and as such public utilities and common carriers, said respondents and each of them are subject to the provisions of an Act to provide for the Regulation of Public Utilities, and an Act concerning Public Utilities.

4. That the post office address of the respondents, and each of them, is No. 323 South Wells street, Chicago, Illinois.

5. That the rate of 93½ cents per ton, charged on common brick carloads from August 26, 1920 to November 27, 1920, as named in Pennsylvania Railroad Company Western Lines Tariff, Supplement 7, to I. P. U. C., F. 283, effective August 26, 1920, from Bernice, Illinois to stations in Chicago and intermediate points on the Pennsylvania Railroad, and the rate of 93½ cents per ton charged on common brick carloads as named in the P. C. C. & St. L. R. R. Tariff, Supplement 5 to I. P. U. C. P 364, effective August 26, 1920, from Bernice to stations in Chicago and intermediate points on the P. C. C. & St. L. R. R. and Pennsylvania R. R., and the rate of 94½ cents per ton, charged on common brick carloads from November 28, 1920, to February 18, 1921, as named in Pennsylvania Railroad Company West- [fol. 22] ern Lines Tariff, Supplement No. 8 to I. P. U. C., F 283, effective November 28, 1920, from Bernice, Illinois, to stations in Chicago and intermediate points on the Pennsylvania Railroad, and the rate of 94½ cents per ton, charged on common brick carloads from November 28, 1920 to February 18, 1921, as named in P. C. C. & St. L. R. R., Tariff Supplement No. 5½ to I. P. U. C., P 364, effective

November 28, 1920, from Bernice, Illinois, to stations in Chicago and intermediate points on the P. C. C. & St. L. R. R. and Pennsylvania R. R., and the rate of 98 cents per ton charged on common brick carloads from February 19, 1921, to February 15, 1922, as named in Pennsylvania Railroad Western Lines Tariff Supplement No. 9 to I. P. U. C., F 283, effective February 19, 1921, from Bernice, Illinois, to stations in Chicago and intermediate points on the Pennsylvania Railroad, and the rate of 98 cents per ton, charged on common brick carloads from February 19, 1921, to February 15, 1922, as named in P. C. C. & St. L. R. R. Tariff Supplement 6 to I. P. U. C., P 364,* effective February 19, 1921, from Bernice, Illinois, to stations in Chicago and intermediate points on the P. C. C. & St. L. R. R. and Pennsylvania R. R., were unjust, unreasonable, unjustly discriminatory, and unduly prejudicial and preferential, and in violation of Sections 32 and 38 of an Act to provide for the regulation of Public Utilities, approved June 30, 1913, in force January 1, 1914, and Section- 32 and 38 of an Act concerning Public Utilities, approved June 29, 1921, in force July 1, 1921.

(Rates are in cents per net ton.)

[fol. 23] 6. 1. Prior to June 25, 1918, the rate on common brick from all brickyards located at points in the Chicago switching district, namely, Weber, Illinois, on the C. & N. W. R. R., Blue Island, Illinois, on the B. & O. C. T. R. R., Grand Trunk R. R. and C. R. I. & P. Ry.; and Indiana Harbor Belt R. R., Riverdale, Illinois, on the B. & O. C. T. R. R., and Dolton, Illinois, on the I. H. B. R. R., to industries and team tracks in Chicago and intermediate points on their own lines was 25 cents; that was also the rate from Bernice, Illinois, via the Pennsylvania R. R. and P. C. C. & St. L. R. R., to industries and team tracks on those roads. The Director General issued General Order No. 28, effective June 25, 1918, advancing

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* The rate of 98 cents via both lines was later published in I. P. U. C., F 307, effective July 15, 1921, via the Pennsylvania R. R., and by the P. C. C. & St. L. R. R. in Supplement No. 4, to I. P. U. C., F 307, effective December 1, 1921.

freight rates generally 25 per cent except a few commodities, which were advanced specific amounts in cents per hundred pounds, irrespective of the measure of the previous rate. Brick (except glazed or enamel) was advanced 2 cents per 100 pounds, or 40 cents per ton. General Order No. 28 also carried rules for the disposition of fractions, so that the 25-cent rate on common brick named above was advanced to 70 cents. Had the 25-cent rate been advanced 25 per cent as was done generally under Order 28, the new rate would have been 30 cents, whereas it was made 70 cents, so that the effect of General Order No. 28 on the rates on common brick from the brick plants named in paragraph "6" was not only an advance of 25 per cent, but an additional advance of 2 cents per 100 pounds, or 40 cents per ton.

2. Freight Rate Authority 1887 issued October, 1918, corrected this discrimination on the rates from brickyards in the Chicago switching district by authorizing an advance [fol. 24] of 25 per cent in the rates in effect June 24, 1918, in lieu of the 2-cent advance under General Order 28, thus reducing the rate of 70 cents to 30 cents.

3. Pursuant to the order to the I. C. C. in Ex Parte 74, the 70-cent rate from Bernice was increased by 33⅓ per cent to 93½ cents, and the 30-cent rate from points of origin within the Chicago switching district became 40 cents, both increases taking effect August 26, 1920.

4. Effective November 28, 1920, pursuant to a supplement of the Illinois Public Utilities Commission in Case 10620, the 33⅓ per cent increase was replaced by an increase of 35 per cent, making the rate from Bernice 94½ cents per ton, and the rate from Chicago switching district points 40 cents and 40½ cents per ton.

5. Under order of the Interstate Commerce Commission in Docket 11703, the 35 per cent increase was replaced by an increase of 40 per cent, making the Bernice rate 98 cents per ton, and the Chicago district 40 and 42 cents per ton.

6. These rates remained in effect until February 16, 1922, when the 98-cent rate from Bernice was reduced to 50 cents per ton, and the 40 and 42-cent rates from Chicago district points were increased by the Indiana Harbor Belt R. R. and the B. & O. C. T. R. R., to 50 cents per ton.

7. The rates on common brick from Bernice, Illinois, to Chicago, had always been on the same basis as the rates from the plants located in the Chicago switching district. When F. R. A. 1887 was issued, complainants requested the defendants to restore the relationship in common brick rates by putting in the 30-cent rate from Bernice to Chi- [fol. 25] cago. The Pennsylvania R. R. Western Lines and the P. C. C. & St. L. R. R. made application to the proper freight traffic committee for authority to publish the 30-cent rate. This application was approved by the various freight traffic committees, but was not approved by Mr. Chambers, director of traffic.

8. These facts show that the rate relationship between Bernice, on one hand, and Dolton, Riverdale, Blue Island and Weber on the other, was destroyed, thus putting an undue burden on shipments of common brick from Bernice to Chicago.

9. The greater part of the output of the common brick-yards in and near the Chicago district is shipped to Chicago. The yards at Bernice were built to compete in the Chicago market with the yards in the Chicago switching district. To enable them to do this the carriers put in the same rates and agreed to maintain such parity on common brick, between Bernice and yards in the switching district to Chicago.

10. Moreover, common brick is a low-grade commodity and moves comparatively short distances, so that in order to operate the plants of complainants located at Bernice economically, it is necessary to ship a large percentage of the output to Chicago. During the years 1914 to 1918, inclusive, an average of 85 per cent of the total shipments from the plants at Bernice were shipments into the Chicago switching district.

11. The principal inbound shipments at the brick plants are coal and fuel oil carloads and the same rates on these commodities apply to Bernice, as apply to the plants in the Chicago switching district. The wages paid are the same [fol. 26] at all brick yards named in this complaint. The brick made at Bernice is sold in Chicago at the same price as is the brick made at plants located at Dolton, Riverdale, Blue Island and Weber. The rate of 93½ cents, 94½

cents, and 96 cents, charged by respondents on common brick carloads from Bernice to points in the Chicago switching district from August 26, 1920, to February 15, 1922, inclusive, were unreasonable and unjustly discriminatory and unduly prejudicial against the brick plants at Bernice, and in favor of the brick plants at Dolton, Riverdale, Blue Island and Weber, by amounts varying from 40 cents per ton, which is 80 cents per thousand brick, to 58 cents per ton, or $1.16 per thousand brick.

7. 1. Your petitioners further respectfully represent that from September 1, 1920, to February 16, 1922, they have made shipments of common brick carloads from Bernice to Chicago and intermediate points and that the carriers hereinabove named have charged, demanded, collected and received from your petitioner compensation at the rates of 93½, 94½ and 98 cents per ton, as will more fully and completely appear from the statement to be made and the paid freight bills ready to be produced before this Commission.

2. That by reason of the facts stated in the foregoing paragraphs, complainant has been subjected to the payment of rates for transportation which were, when enacted, and when collected, unjust and unreasonable, and in violation of Section 32 of an Act to provide for the regulation of Public Utilities, and Section 32, of an Act concerning Public Utilities, unjustly discriminatory and unjuly preferential and prejudicial in violation of Section 38 of the Act to [fol. 27] provide for the regulation of Public Utilities, and Section 38 of an Act concerning Public Utilities.

8. Wherefore, complainant prays that the respondents and each of them, may be required to answer the charges herein; that upon a final hearing hereof the Commission will order the said respondents and each of them to make due reparation to the complainant for the unlawful charges hereinbefore alleged to have been collected by the respondents and each of them, based upon the difference between the rates charged of 93½ cents, 94½ cents, and 98 cents per ton, and the rate of 40 cents per ton, or such other sum as, in view of the evidence to be adduced herein, the Commission will determine that the complainant is entitled to, together with interest at the legal rate from the date of payments of such unreasonable, excessive, unjustly dis-

criminatory and unduly preferential rates, and that the Commission will make such further order in the premises as may seem meet.

Joint answer of the respondents filed November 15, 1922, before the Illinois Commerce Commission was as follows:

ANSWER

For their answer to the complaint filed in the above entitled proceedings these respondents respectfully state and show:

1 and 2

They admit the allegations contained in these paragraphs.

3

They admit that they are common carriers over and own lines of railroad and as such are subject to the provisions of an Act to provide for the regulation of Public [fol. 28] Utilities, and an Act concerning Public Utilities.

4

They admit the allegation contained in this paragraph.

5

For verification of rates referred to in this paragraph these respondents respectfully refer to the tariffs lawfully on file with the Illinois Commerce Commission.

6

1st and 2nd paragraphs. These respondents respectfully refer to tariffs lawfully in effect and to records of the Director General of Railroads, United States Railroad Administration.

3rd paragraph. They deny that the increase of 33⅓ per cent was in accordance with Interstate Commerce Commission decision in Ex Parte 74; and they respectfully refer to the tariffs lawfully in effect.

4th paragraph. They refer to the records of the Illinois Commerce Commission in Case No. 10620, also to tariffs lawfully in effect.

5th paragraph. They refer to records of the Interstate Commerce Commission in Docket No. 11703 and to tariffs lawfully in effect.

6th paragraph. They respectfully refer to tariffs lawfully in effect.

7th paragraph. They deny and respectfully demand proof of the allegations contained in this paragraph.

8th paragraph. They deny existence of rate relation- [fol. 29] ship and that undue burden was placed on common brick from Bernice to Chicago.

9th paragraph. They deny and respectfully demand proof of the allegations contained in this paragraph.

10th paragraph. These respondents have no knowledge of the allegations contained in this paragraph and so far as the same may be deemed relevant and material, demand strict proof thereof.

11th paragraph. They have no knowledge as to inbound shipments nor wages paid at brickyards nor selling prices, and respectfully refer to tariffs lawfully in effect as to application of same rates to Bernice as apply to Chicago. They deny that the rates charged were unreasonable, unjustly discriminatory and unduly prejudicial and in favor of brickyards at other points.

7

1st paragraph. These respondents respectfully demand proof of shipments and payments of charges referred to.

2nd paragraph. They deny that rates were in violation of Section- 32 and 38 of certain Illinois acts.

8

They deny that complainant is entitled to reparation and that respondents' rates were unreasonable, excessive, unjustly discriminatory, and unduly preferential.

These respondents further answering say that prior to the 18th day of April, 1922 the rates complained of were published and collected by these respondents pursuant and in obedience to the order of the Interstate Commerce [fol. 30] Commission in its Docket No. 11703, dated Janu-

ary 11, 1921, wherein said Interstate Commerce Commission found it necessary and ordered the respondents to publish and collect such rates and charges in order to remove undue prejudice, undue preference and advantage, and unjust discrimination found by said Commission then to exist in the relationship of the corresponding interstate and intrastate rates and charges; said order of January 11, 1921, was vacated by the Interstate Commerce Commission on the 18th day of April, 1922 by reason of and only because of the Illinois Commerce Commission having on March 16, 1922 approved and continued in effect said rates and charges as to the lawfully established and applicable intrastate rates and charges. The Illinois Commerce Commission is without authority or jurisdiction to penalize or award damages or reparation against the respondents for the acts of said respondents pursuant and in obedience to the said order of the Interstate Commerce Commission.

The amended complaint of the Illinois Brick Company filed before the Interstate Commerce Commission January 26, 1923, was as follows:

AMENDED COMPLAINT

Now comes Illinois Brick Company, a corporation, complainant herein, and by leave of the Commission first had and obtained, files herein this, its amended complaint, as follows, to wit:

The complainant herein respectfully shows:

1. That the Illinois Brick Company is a corporation organized under and by virtue of the laws of the State of Illinois; that it has its principal place of business in the City of Chicago, State of Illinois, and is engaged in the business of manufacturing and selling common brick; that [fol. 31] it has a number of yards or brick making plants in and about the Chicago switching district (as defined by Lowry Tariff I. P. U. S. 39), one at Dolton, Illinois, on the Indiana Harbor Belt Railroad, one at Blue Island, Illinois, on the Baltimore and Ohio Chicago Terminal Railroad and Grand Trunk Railroad, one at Blue Island, Illinois, on the Chicago, Rock Island and Pacific Railway, one at Weber, Illinois, on the Chicago and Northwestern Rail-

road, all in the Chicago switching district; one at Shermerville, Illinois, on the Chicago, Milwaukee and St. Paul Railway, one at Bernice, Illinois, on the Pennsylvania Railroad Western Lines, one at Bernice, Illinois, on the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad; the last three plants are a short distance outside the Chicago switching district, the one at the greatest distance being about nine miles.

2. That the post office address of complainant is No. 111 West Washington Street, Chicago, Illinois.

3. That Pennsylvania Railroad Company Western Lines, and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, respondents herein, and each of them, are public utilities, and are common carriers engaged in the transportation of passengers and property wholly by railroad, between points (among others) in the State of Illinois, and as such public utilities and common carriers, said respondents and each of them are subject to the provisions of an Act to provide for the Regulation of Public Utilities, and an Act concerning Public Utilities.

4. That the post office address of the respondents, and each of them, is No. 323 South Wells street, Chicago, Illinois.

[fol. 32] 5. That the rate of 70 cents per ton charged on common brick carloads from March 1, 1920, to August 26, 1920, as named in Pennsylvania Railroad Company Western Lines Tariff, I. P. U. C. F. 283, and the rate of 70 cents per ton charged on common brick carloads from March 1, 1920, to August 26, 1920, as named in P. C. C. & St. L. Tariff, I. P. U. C. P. 364, and the rate of 93½ cents per ton, charged on common brick carloads from August 26, 1920, to November 27, 1920, as named in Pennsylvania Railroad Company Western Lines Tariff, Supplement 7, to I. P. U. C., F. 283, effective August 26, 1920, from Bernice, Illinois, to stations in Chicago and intermediate points on the Pennsylvania Railroad, and the rate of 93½ cents per ton charged on common brick carloads as named in the P. C. C. & St. L. R. R. Tariff, Supplement 5 to I. P. U. C., P. 364, effective August 26, 1920, from Bernice to stations in Chicago and intermediate points on the P. C. C. & St. L. R. R. and Pennsylvania R. R., and the

rate of 94½ cents per ton, charged on common brick carloads from November 28, 1920, to February 12, 1921, as named in Pennsylvania Railroad Company Western Lines Tariff, Supplement No. 8 to I. P. U. C., F. 283, effective November 28, 1920, from Bernice, Illinois, to stations in Chicago and intermediate points on the Pennsylvania Railroad, and the rate of 94½ cents per ton, charged on common brick carloads from November 28, 1920, to February 18, 1921, as named in P. C. C. & St. L. R. R. Tariff Supplement No. 5½ to I. P. U. C., P. 364, effective November 28, 1920, from Bernice, Illinois, to stations in Chicago and intermediate points on the P. C. C. & St. L. R. R. and Pennsylvania R. R., and the rate of 98 cents per ton charged on [fol. 33] common brick carloads from February 19, 1921, to February 15, 1922, as named in Pennsylvania Railroad Western Lines Tariff Supplemental No. 9 to I. P. U. C., F. 283, effective February 19, 1921, from Bernice, Illinois, to stations in Chicago and intermediate points on the Pennsylvania Railroad, and the rate of 98 cents per ton, charged on common brick carloads from February 19, 1921, to February 15, 1922, as named in P. C. C. & St. L. R. R. Tariff Supplement 8 to I. P. U. C., P. 364 * effective February 19, 1921, from Bernice, Illinois, to stations in Chicago and intermediate points on the P. C. C. & St. L. R. R. and Pennsylvania R. R., were unjust, unreasonable, unjustly discriminatory, and unduly prejudicial and preferential, and in violation of Sections 32 and 38 of an Act to provide for the Regulation of Public Utilities, approved June 30, 1913, in force January 1, 1914, and Sections 32 and 38 of an Act concerning Public Utilities, approved June 29, 1921, in force July 1, 1921.

(Rates are in cents per net ton.)

6. Prior to June 25, 1912, the rate on common brick from all brick yards located at points in the Chicago switching district, namely, Weber, Illinois, on the C. & N. W. R. R., Blue Island, Illinois, on the B. & O. C. T. R. R., Grand Trunk R. R., and C. R. I. & P. Ry.; and Indiana Harbor

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* The rate of 98 cents via both lines and later published in I. P. U. C., F. 307, effective July 15, 1921, via the Pennsylvania R. R., and by the P. C. C. & St. L. R. R, in Supplement No. 4, to I. P. U. C., F. 307, effective December 1, 1921.

Belt R R., Riverdale, Illinois, on the B. & O. C. T. R. R., and Dolton, Illinois, on the I. H. B. R. R., to industries and team tracks in Chicago and intermediate points on their own lines was 25 cents; that was also the rate from Bernice, Illinois, via the Pennsylvania R. R. and P. C. C. & St. L. [fol. 34] R. R., to industries and team tracks on those roads. The Director General issued General Order No. 28, effective June 25, 1918, advancing freight rates generally 25 per cent except a few commodities, which were advanced specific amounts in cents per hundred pounds, irrespective of the measure of the previous rate. Brick (except glazed or enamel) was advanced 2 cents per 100 pounds, or 40 cents per ton. General Order No. 28 also carried rules for the disposition of fractions, so that the 25-cent rate on common brick named above was advanced to 70 cents. Had the 25-cent rate been advanced 25 per cent as was done generally under Order 28, the new rate would have been 30 cents, whereas it was made 70 cents, so that the effect of General Order No. 28 on the rates on common brick from the brick plants named in paragraph "1" was not only an advance of 25 per cent, but an additional advance of 2 cents per 100 pounds, or 40 cents per ton.

Freight Rate Authority 1887 issued October, 1918, corrected this discrimination on the rates from brick yards in the Chicago switching district by authorizing an advance of 25 per cent in the rates in effect June 24, 1918, in lieu of the 2 cent advance under General Order 28, thus reducing the rate of 70 cents to 30 cents; but it left the rate from Bernice to points within the Chicago switching district at 70 cents per ton.

Pursuant to the order to the I. C. C. in Ex Parte 74, the 70-cent rate from Bernice was increased by 33⅓ per cent to 93½ cents, and the 30-cent rate from points of origin within the Chicago switching district became 40 cents, both increases taking effect August 26, 1920.

[fol. 35] Effective November 28, 1920, pursuant to a supplement of the Illinois Public Utilities Commission in Case 10620, the 33⅓ per cent increase was replaced by an increase of 35 per cent, making the rate from Bernice 94½ cents per ton, and the rate from Chicago switching district points 40 cents and 40½ cents per ton.

Under order of the Interstate Commerce Commission in Docket 11703, the 35 per cent increase was replaced by an

increase of 40 per cent, making the Bernice rate 98 cents per ton, and the Chicago District 40 and 42 cents per ton.

These rates remained in effect until February 16, 1922, when the 98-cent rate from Bernice was reduced to 50 cents per ton, and the 40 and 42-cent rates from Chicago district points were increased by the Indiana Harbor Belt R. R. and the B. & O. C. T. R. R., to 50 cents per ton.

The rates on common brick from Bernice, Illinois, to Chicago, had always been on the same basis as the rates from the plants located in the Chicago switching district. When F. R. A. 1887 was issued, complainants requested the defendants to restore the relationship in common brick rates by putting in the 30-cent rate from Bernice to Chicago. The Pennsylvania R. R. Western Lines and the P. C. C. & St. L. R. R. made application to the proper Freight Traffic Committee for authority to publish the 30-cent rate. This application was approved by the various Freight Traffic Committees, but was not approved by Mr. Chambers, director of traffic.

These facts show that the rate relationship between Bernice, on one hand, and Dolton, Riverdale, Blue Island and Weber on the other, was destroyed, thus putting an undue burden on shipments of common brick from Bernice to Chicago.

[fol. 36] The greater part of the output of the common brickyards in and near the Chicago district is shipped to Chicago. The yards at Bernice were built to compete in the Chicago market with the yards in the Chicago switching district. To enable them to do this the carriers put in the same rates and agreed to maintain such parity on common brick, between Bernice and yards in the switching district to Chicago.

Moreover, common brick is a low grade commodity and moves comparatively short distances, so that in order to operate the plants of complainants located at Bernice economically, it is necessary to ship a large percentage of the output to Chicago. During the years 1914 to 1918, inclusive, an average of 85 per cent of the total shipments from the plants at Bernice were shipments into the Chicago switching district.

The principal inbound shipments at the brick plants are coal and fuel oil carloads and the same rates on these commodities apply to Bernice, and apply to the plants in the

Chicago switching district. The wages paid are the same at all brickyards named in this complaint. The brick made at Bernice is sold in Chicago at the same price as is the brick made at plants located at Dolton, Riverdale, Blue Island and Weber. The rates of 70 cents, 93½ cents, 94½ cents, and 98 cents, charged by respondents on common brick carloads from Bernice to points in the Chicago switching district from March 1, 1920, to February 15, 1922, inclusive, were unreasonable and unjustly discriminatory and unduly prejudicial against the brick plants at Bernice, and in favor of the brick plants at Dolton, Riverdale, Blue Island and Weber, by amounts varying from [fol. 37] 40 cents per ton, which is 80 cents per thousand brick, to 58 cents per ton, or $1.16 per thousand brick.

7. Your petitioners further respectfully represent that from March 1, 1920, to February 16, 1922, they have made shipments of common brick carloads from Bernice to Chicago and intermediate points and that the carriers hereinabove named have charged, demanded, collected, and received from your petitioner compensation at the rates of 70, 93½, 94½ and 98 cents per ton, as will more fully and completely appear from the statement to be made and the paid freight bills ready to be produced before this Commission.

That by reason of the facts stated in the foregoing paragraphs, complainant has been subject to the payment of rates for transpor-tion which were, when enacted and when collected, unjust and unreasonable, and in violation of Section 32 of an Act to provide for the Regulation of Public Utilities, and Section 32, of an Act concerning Public Utilities; unjustly discriminatory and unduly preferential and prejudicial in violation of Section 38 of the Act to provide for the regulation of Public Utilities, and Section 38 of an Act concerning Public Utilities.

8. Wherefore, complainant prays that the respondents and each of them, may be required to answer the charges herein; that upon a final hearing hereof the Commission will order the said respondents and each of them to make due reparation to the complainant for the unlawful charges hereinbefore alleged to have been collected by the respondents and each of them, based upon the difference between the rates charged of 70 cents, 93½ cents, 94½ cents, and 98 cents per ton, and the rates of 30 cents and 40 cents per

ton, or such other sum as, in view of the evidence to be [fol. 38] adduced herein, the Commission will determine that the complainant is entitled to, together with interest at the legal rate from the rate of payments of such unreasonable, excessive, unjustly discriminatory and unduly preferential rates, and that the Commission will make such further order in the premises as may seem meet.

Joint answer of respondents to the amended complaint filed February 8, 1923, before the Illinois Commerce Commission was as follows:

Now comes The Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, defendants named in and under complainant's amended complaint filed in the above entitled case, and respectfully state and show unto this Honorable Commission:

I

That the above original complaint was set for hearing on January 24, 1923; that on said date complainant appeared before this Honorable Commission by counsel and upon the calling of said case on the docket answered that complainant was ready for hearing; that thereafter and on the same day at the commencement of the hearing by Examiner W. C. Kaylor, complainant asked for leave to amend its complaint filed herein and to enlarge the issues therein raised by praying for reparation on shipments moving during a considerable period, to-wit: March 1 to September 1, 1920, prior to the period set up in the original complaint; that these defendant- had no notice whatever of the fact that complainant would ask for leave to amend and had no knowledge whatever of its intention so to do until after the [fol. 39] commencement of the hearing, at which time defendants made formal objection to complainant's motion for leave to amend, which objection was overruled and an exception taken by defendants.

II

These defendants further respectfully state and show unto this Honorable Commission that Section 72 of Illinois Commerce Commission law provide as follows:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time

the product, commodity or service, as to which complaint is made, was furnished or performed. * * *"

that the original complaint herein was filed with this Honorable Commission October 28, 1922, at which time under Section 72 aforesaid, complaintant's right of action for reparation during the period March 1, 1920, to September 1, 1920, had become and already was barred; that the complainant at the time of filing said original complaint having no right of action for reparation during said period cannot now by amendment to the original complaint acquire any rights whatever which it may have lost by reason of its own laches; that this Commission has no power, authority, or jurisdiction under the Act of Illinois Legislature to grant leave to complainant after commencement of a hearing to file an amended complaint enlarging the issues and scope of the hearing to include a period barred under the act, and that the action of this Commission in granting complainant's motion to amend its complaint, as aforesaid, was unlawful and of no avail as against these defendants and that [fol. 40] said Commission has no right, power and authority to compel these defendants to appear before it for the purpose of defending against an action which had become barred under the law; all of which objections were made by defendant to complainant's motion for leave to amend, which objections were overruled and exceptions taken by defendants.

III

These defendants further respectfully state and show that Section 208 (a) of the Transportation Act, 1920, provides as follows:

"All rates, fares and charges, and all classifications, regulations, and practices, in anywise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the *the* services rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced and no such classification, regulation, or practice shall be changed in such manner as to reduce any

such rate, fare, or charge, unless such reduction or change is approved by the Commission."

That the Interstate Commerce Commission in conference on March 13, 1922, adopted the following:

"Voted that Section 208 (a) of the Transportation Act, 1920, does not authorize the Commission to award reparation, or consent to award of reparation made by a state Commission, on intrastate shipments which move during the guaranty period March 1 to September 1, 1920."

that an award of reparation is in effect a retroactive reduction of a rate; that Transportation Act, 1920, aforesaid, forbids any such reduction, except with the consent and [fol. 41] approval of the Interstate Commerce Commission; that said Interstate Commerce Commission has ruled, as aforesaid, that it has no power or authority to consent to such an award by a state Commission; that the Illinois Commerce Commission has, therefore, no right, power, or authority under the Act of Congress to consider or take evidence of shipments moving during said period with a view to awarding reparation thereon; that said objections were made by defendants at the hearing of the above entitled case to complainant's motion for leave to amend, which objections were overruled and exceptions taken by defendants.

IV

These defendants therefore respectfully state and show unto your Honorable Commission that its action in granting complainant leave to amend its complaint was not within its power, authority, or jurisdiction for the reason that no notice had been given defendants by complainant that it would ask for leave to amend its complaint and enlarge the issues; that the alleged right of action advanced by complainant as a reason for its amended complaint was and had become already barred under the law; that this Honorable Commission has no jurisdiction, power or authority to award reparation during the period in question under Transportation Act, 1920, even had such right of action not already been barred by law.

For the reasons, therefore, hereinbefore enumerated and set forth and for the reasons that the Illinois Commerce Commission has no power, authority, or jurisdiction to

[fol. 42] award reparation as against these defendants during the period March 1, 1920 to September 1, 1920, these defendants have elected to and will stand upon their legal rights as raised in this answer and in their objections made upon the record, and will not appear at a further hearing of the above entitled case before this Commission or suffer any evidence as to the amended complaint without further order of this Honorable Commission.

Wherefore they pray that as to them said amended complainant may hence be dismissed.

Brief and argument for the Illinois Brick Company filed before the Illinois Commerce Commission April 16, 1923.

Brief and argument for Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company filed before the Illinois Commerce Commission April 16, 1923.

Order of the Illinois Commerce Commission entered November 7, 1923, as follows:

ORDER—Nov. 7, 1923

The Illinois Brick Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Chicago, State of Illinois, engaged in the business of manufacturing and selling common brick, by complaint filed October 28, 1922, alleges:

That the rates exacted by the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company from August 26, 1920, to February 15, 1922, for the transportation of common brick from Bernice, Illinois, to Chicago, Illinois, and intermediate points on the line of the Pittsburgh, Cincinnati, Chicago [fol. 43] and St. Louis Railroad and Pennsylvania Railroad, were unjust, unreasonable and unjustly discriminatory and unduly prejudicial and preferential and in violation of Sections 32 and 38 of an act entitled, "An Act to provide for the regulation of public utilities," approved June 30, 1913, in force January 1, 1914, and Sections 32 and 38 of

an act entitled, "An Act concerning public utilities," approved June 29, 1921, in force July 1, 1921.

Complainant asks that the defendants and each of them may be required to make due reparation to the complainant by payment to complainant of all charges collected in excess of 40 cents per ton or such other sum as in view of the evidence adduced the Commission determines that the complainant is entitled to, together with interest at the legal rate from the date of payment of the alleged unreasonable, excessive, unjustly discriminatory and unduly prejudicial rates charged.

This complaint was filed with the Commission October 28, 1922. Section 72 of Article 5 of an act entitled, "An Act to provide for the regulation of Public Utilities," provides:

"All complaints for the recovery of damages shall be filed with the Commission with- two years from the time the * * * service as to which complaint is made was furnished or performed * * *."

The Commission therefore finds that the complaint with respect to the shipments, service upon which was performed prior to October 28, 1920, be dismissed.

The plants of the Illinois Brick Company at Bernice, Illinois, compete with other brick plants located in the Chicago switching district for business in the Chicago market. The [fol. 44] products of some of the brick plants in the Chicago switching district undergoes no railroad transportation as their product is delivered by team or truck. The most important competition that the plants outside the Chicago switching district meets, appears to be with the plants at Blue Island and Riverdale.

Prior to June 25, 1918, the rate for single line hauls to points within the Chicago switching district from the respective points below were:

Weber, Illinois, via the Chicago & North Western Railroad, Riverdale and Blue Island, via the Baltimore & Ohio Chicago Terminal Railroad, Blue Island via the Chicago, Rock Island and Pacific Railroad, Blue Island via the Grand Trunk, Dolton, via the Indiana Harbor Belt Railroad, Lansing, and Bernice via the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad, Bernice, via the Pennsylvania Railroad and Chicago Heights, via the Baltimore & Ohio Chicago

Terminal Transfer Railroad, 25 cents per ton of 2,000 pounds and Schermerville, Illinois, via the Chicago, Milwaukee & St. Paul Railroad, 30 cents per ton of 2,000 pounds.

On June 25, 1918, the rates for the transportation of common brick to all points including those within the Chicago switching district were increased 40 cents per ton, under General Order No. 28, issued by the Director General of Railroads. Under the rule for the disposition of fractions stated in the said General Order the rate of 25 cents per ton was increased to 70 cents per ton from all of the aforesaid points to destinations within the Chicago switching district.

By freight rate authority No. 1887, issued October 19, 1918, the rate of 70 cents per ton from Weber, Illinois, via the Chicago & North Western Railroad, Riverdale via the [fol. 45] Baltimore & Ohio Chicago Terminal Railroad, Blue Island via the Chicago, Rock Island and Pacific Railroad and Grand Trunk Railroad, and Dolton, Illinois, via the Indiana Harbor Belt Railroad was reduced to 30 cents per ton, while the rate from Lansing, Illinois, via the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad, Bernice, Illinois, via the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad and Pennsylvania Railroad, Chicago Heights, via the Baltimore & Ohio Chicago Terminal Railroad and Shermerville via the Chicago, Milwaukee & St. Paul Railroad remained at 70 cents per ton.

Effective August 26, 1920, the following changes were made:

Weber, Illinois, Riverdale, Illinois, Blue Island, and Dolton, Illinois, 40 cents per ton.

Lansing, Bernice, and Chicago Heights, Illinois, 93½ cents per ton and Shermerville, Illinois, 90 cents per ton.

On November 15, 1920, pursuant to a general increase in all rates to 35 per cent over the rates in effect August 25, 1920, authorized by this Commission, Docket 10620, the rates from the respective points via the aforesaid routes were changed as follows:

From Weber and Dolton, Illinois, no change.

From Riverdale and Blue Island, Illinois, 40½ cents per ton.

From Lansing, Bernice, and Chicago Heights, Illinois, 94½ cents per ton.

From Shermerville, Illinois, 90 cents per ton.

On February 19, 1921, pursuant to the order of the Interstate Commerce Commission in Docket 11703, fixing the [fol. 46] Illinois intrastate rates at 40 per cent over the August 25, 1920, rates, the rates from the respective points via the aforesaid routes were made:

From Weber and Dolton, Illinois, no change.

Riverdale and Blue Island, Illinois, 42 cents per ton.

Lansing and Bernice, Illinois, 98 cents per ton.

From Shermerville, Illinois, $1 per ton.

On February 16, 1922, pursuant to the order of the Interstate Commerce Commission in Docket 11317, the rates from the respective points via the aforesaid routes were changed to the following:

From Weber, Illinois, no change.

From Riverdale, and Blue Island, Illinois, via the Baltimore & Ohio Chicago Terminal Railroad, 50 cents per ton.

From Lansing, Bernice, and Chicago Heights, Illinois, 50 cents per ton.

Subsequently, the Chicago, Rock Island & Pacific Railroad, effective April 25, 1922, increased its rate from Blue Island to 50 cents per ton, and on March 14, 1922, the Grand Trunk Railroad increased its rate from Blue Island, Illinois, to 50 cents per ton.

It will be observed from the aforesaid history of the rates that the parity existing between the brick producing plants have been seriously disturbed and that it was not until after the Interstate Commerce Commission entered its order in Docket 11317, 64 I. C. C. 273, that the parity of the rates theretofore existing, with the exception of the rate from Weber, Illinois, was restored.

The distances involved from the plants within the Chicago switching district range from 13 to 22 miles, and from [fol. 47] the plants outside of the Chicago switching district, 21 to 30 miles.

The disturbance of the parity of the rates arose by reason of the Director General of Railroads ordering an increase of 40 cents per ton on all brick between all points instead of an increase of 25 per cent. It apparently was not anticipated by the Director General of Railroads that the switching rates for the transportation of brick should be increased by 40 cents per ton as other switching rates were only increased 25 per cent. This is borne out by the fact that on October 19, 1918, the Director of Traffic of the United States Railroad Administration, authorized a re-

duction in the switching rates for the transportation of brick between points within the Chicago switching district eliminating the 40 cents per ton increase and substituting therefor an increase of 25 per cent. At that time apparently no consideration was given to the relationship in the rates here considered nor to the competitive conditions under which the relationship was established.

The distance from Bernice, Illinois, to Chicago, Illinois, via the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad and via the Pennsylvania Railroad is 23 miles, while the distances between points within the Chicago switching district with which the rate from Lansing, Illinois, has been compared range from 13 to 22 miles.

The defendants in their effort to justify the rates attacked introduced a cost study. Making all due allowances for the disputed items of cost, it is clear that the rate of 30 cents per ton does not produce sufficient revenue to pay operating expenses. It is also clear from the cost study that the rate of 50 cents per ton for single line application [fol. 48] at the time the shipments here under consideration moved, provides adequate revenue for the transportation of brick from Bernice, Illinois, to points of destination within the Chicago switching district and intermediate points covered by this complaint.

We find that to the extent that the rates here complained of exceed by more than 10 cents per ton the rates contemporaneously applied between points within the Chicago switching district, the rates from Lansing, Illinois, were unjustly discriminatory.

Giving due consideration to the development of all of the rates from all brick producing plants within the Chicago switching district and points immediately beyond the said switching district, the services performed and the conditions under which such services were performed we find that the complainant has been damaged to the extent that the charges assessed are greater than the charges that would have been assessed had the said charges been predicated on a rate of 50 cents per ton, minimum 60,000 pounds per car.

The Commission will accordingly reserve jurisdiction of the subject matter and of the parties for the purpose of determining the amount of reparation due under the findings of the Commission expressed herein.

It is therefore ordered that the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company and the Pennsylvania Railroad Company, be, and they are hereby severally directed to file with the Commission within sixty days of the date of this order, a statement showing car number and initial date of shipment, date of delivery, point of origins, destination, rate charged, charges assessed, and rate and charges that would have been assessed and amount of [fols. 49-70] reparation due under the findings of the Commission expressed herein.

It is further ordered that the Commission reserve jurisdiction of the subject matter and of the parties herein for the purpose of entering an order awarding reparation for charges collected in excess of the rates found to be free from discrimination under the findings of the Commission expressed herein.

STATEMENTS SHOWING SHIPMENTS

Itemized statements signed by the Illinois Brick Company and filed with the Illinois Commerce Commission December 31, 1923, purporting to show shipments of common brick in carloads from Bernice, Illinois, to Chicago district and the amount of reparation due on the shipments contained in said statement based on the difference between the rate of 93½ cents, 94½ cents and 98 cents, respectively, as prescribed by the tariffs and orders of the Interstate Commerce Commission and the Illinois Commerce Commission and the new rate of 50 cents established by the Commission and the amount of reparation due on that basis as follows: (The statements were not offered in evidence before the Illinois Commerce Commission; they were merely filed there by the Illinois Brick Company.)

Total shipments from Bernice, Illinois, to Chicago district via Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, showing the total reparation due on all the said shipments based on the difference between the aforesaid rates, $7,095.82. Total shipments from Bernice, Illinois, to Chicago district via Pennsylvania Railroad, Western Lines, showing total reparation due on all the said shipments based on the difference between the aforesaid rates, $21,869.90.

[fol. 71] Order of the Illinois Commerce Commission dated April 16, 1924, as follows:

ORDER—April 16, 1924

It appearing that on November 7, 1923, the Commission entered its report, findings and order in the above entitled proceeding which is hereby referred to and made a part hereof, under which order the Commission reserved jurisdiction of the subject matter and of the parties for the purpose of entering an order awarding reparation for charges collected in excess of the rates found to be just and reasonable in said order, and

It further appearing that this proceeding now comes on for further consideration on the question of reparation. A statement certified to by the auditor of Pennsylvania Railroad Company showing amount of reparation due under the aforesaid order and findings of the Commission entered November 7, 1923, has been filed which shows the amount of reparation due to be $28,965.72. The amount of reparation due is stipulated to be the amount due under the aforesaid order and findings of the Commission in the said order of November 7, 1923, and we accordingly find that the complainant is entitled to an award of reparation in the amount of $28,965.72 and interest at the legal rate from the date of payment for excessive freight charges collected on shipments transported by the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (now Pennsylvania Railroad Company), from Bernice, Illinois, to points within the Chicago switching district, during the period October 28, 1920 to February 15, 1922.

It is therefore ordered that the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (now Pennsylvania Railroad [fol. 72] Company), be, and they are hereby authorized and directed to pay to the complainant on or before May 1, 1924, $28,965.72 and interest thereon at the legal rate from date of payment as reparation on account of unreasonable rates charged and charges exacted for the transportation of common brick between the aforesaid points in accordance with the findings expressed in the order of November 7, 1923, Docket 12765 and the order and findings expressed herein.

Statement of Evidence

Evidence for Illinois Brick Company Before the Illinois Commerce Commission

WILLIAM ALLISON.

Direct examination on January 24, 1923:

I am traffic manager for Illinois Brick Company. I have had occasion to handle various tariffs and various rates applying on brick shipments from Chicago. I have had railroad experience also. The principal place of business of petitioner is 111 West Washington street, Chicago. It is engaged in the manufacture and sale of common building brick. Last season they operated nine yards; one at Shermerville on the C. M. & St. P. Ry.; one at Bernice on the Pennsylvania; one at L— on the Illinois Central; all of those yards are outside of the boundary of the Chicago switching district as defined in the Lowry tariffs. We have two yards at Weber station on the North Western; one yard at Blue Island on the B. & O. C. T. and Grand Trunk; one yard at Blue Island on the Rock Island and one yard at Dallas (Dolton) on the I. H. B. Those five [fol. 73] yards are in the Chicago switching district. We load almost any kind of a car that will hold brick. This includes rough box cars, rough stock cars and low side gondolas. The bricks are in almost every case loaded to 110 per cent of the marked capacity of the car. Under certain agreements with the Central Freight and Western Weighing Bureau the brick is shipped at an agreed weight of 4 pounds per brick so that there is no expense to the carrier for weighing shipments of brick from these plants. The claims for loss and damage are rare. The capacity of petitioner's 2 plants at Bernice, Illinois is about 45 or 55 million brick per year at each plant. The brick is shipped in carloads. It depends on the amount of building in Chicago for the number of cars shipped per day. It will vary—at times run to 25 or 30 cars per day from the 2 plants. I am talking about shipments for delivery on the Pennsylvania Lines. Petitioner's Exhibit 1 (Rec., 410; Abst., 111) in evidence shows the total number of cars loaded at Bernice and Lansing, Illinois, and the number of cars shipped to the Chicago switching district for the years

1914 to 1921, inclusive, and the first four months of 1922. It includes the cars from Lansing previous to 1919. That year the yard at Lansing was dismantled and there were no shipments from Lansing after March 1, 1920. The market for brick from Bernice is in the Chicago district. It would not be possible to operate the plants at Bernice without shipping to the Chicago district. To operate a plant economically we must ship to our principal market. A plant could not be operated economically to 25 per cent of its capacity. The principal market of petitioner outside of Chicago is to the West. The competition in Indiana and Michigan is [fol. 74] too much for the brick manufacturers here to meet in normal times. We do not have the advantage of Chicago rates from Bernice to points in Illinois west of Chicago or to Iowa or Wisconsin so that having the delivery of Indiana and Michigan limited forces us to ship the greater output of these plants to Chicago. In fact, that was the reason those plants were taken over to furnish Chicago with brick and common brick is a very cheap product. It can only be sold when the delivering price is low and for that reason it does not move at very great distances because the freight rate added to the yard price makes the price of delivery too high. The south yard at Bernice on the Pan Handle, I think, has been operated since 1900. The north plant at Bernice was taken over about 1915 from another company. Petitioner's Exhibit 2 (Rec., 411; Abst., 111) in evidence shows the distance from Bernice to the principal points or districts in the switching district to which common brick is shipped. The average distance is 16.4 miles. That distance is calculated from Washington Heights to the points named. I have divided that to show the Pan Handle and Pennsylvania Railroads. Petitioner's Exhibit 3 (Rec., 412; Abst., 112) in evidence shows a list of common brick plants located in the Chicago switching district on which there is competition with the brick from Bernice on business within the Chicago switching district. From all of the plants, except the plant at Galewood, the rate was 30 cents per ton from March 1, 1920, to August 25, 1925, inclusive, 40 cents and 42 cents from September 1, 1920, to February 15, 1922, for a single-line haul to points in the switching district. The rates for two line-haul per Lowry's Tariff 21 series be- [fol. 75] tween March 1st and August 25th was 2 cents per hundredweight. After August 26, 1920, it was 2½ cents

up to February 19, 1921, when it became 3 cents under a decision of the Interstate Commerce Commission. In Illinois rate cases Docket 11703, that two-line rate applied between industries. The present two-line rate is 2½ cents per hundredweight. Petitioner's Exhibit 4 (Rec., 413; Abst., 112) in evidence, shows the number of cars of common brick shipped from Bernice to Chicago and intermediate points for delivery on the Pennsylvania system. The first column shows the districts, the next column shows miles, the next column shows cars shipped from March 1, 1920, to August 31, 1920, inclusive, the next column shows shipments from September 1, 1920, to February 15, 1922, the next column is the total cars and the next column the car miles. This makes the average car miles 19.6. That compares with the car average shown in Exhibit 2. These figures would be changed as conditions changed but that is the result of actual shipments made for the period shown. In the last six months of the year if building increases more rapidly the car miles average would probably be decreased or if the other way, it might be increased, but that is the result of these actual shipments. Respondents object to the admission of Exhibit 4 in evidence in so far as it has to do with any shipments or movements during the period from March 1, 1920, to August 31, 1920, or during which the injunction granted by the federal court was in effect. The same objection to all evidence introduced at this hearing. Petitioner's Exhibit 5 (Rec., 414, 415; Abst., 113) in evidence, has two pages. On the first page are the rates. On [fol. 76] the second page the tariff authorities. The first column shows shipping points of four points outside the district and four points inside the district with the names of the railroads serving the plants and the miles to Chicago. This distance is from the station to the down town passenger station. The first rate is the rate in effect June 24, 1918, which in all cases except Shermerville was 25c per ton. This 25-cent rate had been in effect from August, 19—, which was about the time the Lowry agreement went into effect and prior to that time, that is, prior to 1911, back for a great number of years, the rate from all of these plants was 1 cent per hundredweight or 20 cents per ton, with the exception of Chicago Heights which for a period had a rate of $5.50 per car of 60,000 pounds, with certain excesses of 16 cents per ton over 60,000 pounds. The rate of June 25,

1918, is the result of General Order 28 issued by the Director General of Railroads. This was a general advance in freight rates of 25 per cent, from which certain commodities were exempted, among them being brick which was given an advance of 2 cents per hundredweight or 40 cents per ton instead of the 25 per cent. The order also carried the rule for disposition of fractions, the result of which was that all of these rates became 70 cents per ton. One of the roads published a 65-cent rate for a short time until they corrected it on account of the disposition of fractions. This made a very peculiar situation. It made the one-line haul 70 cents per ton and the two-line haul 40 cents per ton within the district. It was corrected by the Director General, Freight Rate Authority 1887, issued in October, 1918, in which they authorized an advance of 25 per cent in the rates [fol. 77] on brick instead of 2 cents applying on cars within the switching limits. This order reduced the rates from the yards in the district from 70 cents to 30 cents per ton. The yards outside the district remained at 70 cents per ton. At that time petitioner took the matter up with the various carriers serving the yards outside the district with a view of having them reduced and returned to a parallel with the rates inside the switching district. My understanding is that they all filed petitions with the rate committees which were in effect at that time for permission to do this. These petitions were approved by the rate committees but not by the Director General. Witness understands that in the preparation of said petition respondents prepared a table showing the average distance from Bernice, Lansing and Maynard as compared with distances within the district. Petitioner's Exhibit 6 (Rec., 416; Abst., 114) was handed me by Mr. Shank, who was a witness in Docket 11317 before the Interstate Commerce Commission, with the statement it was made up in the office of Mr. Cooper. It was introduced in evidence in Docket 11317, Interstate Commerce Commission. Mr. Shank is traffic manager of the National Brick Company. Petitioner's Exhibit 6 is a true copy of the document handed me by Mr. Shank. I was present at the hearing on Docket 11317. I heard Mr. Shank testify where he procured the original. I did not hear the evidence from the defendants in that case. Petitioner's Exhibit 6 is a true copy of that exhibit in Docket 11317 and the original is in the possession of the Interstate Commerce Commission.

Petitioner's Exhibit 6 not received in evidence. Effective August 26, 1920, as a result of an order of the Illinois Com-
[fol. 78] merce Commission in the advance rate case Ex Parte 74, rates were advanced 33⅓ per cent, which advanced the rates for brick from yards inside the district to 40 cents per ton and from Lansing, Bernice, Chicago Heights and Shermerville to 83½ and 90 cents. In November, 1920, the amended order of the Illinois Commerce Commission advanced the rates 35 per cent. These rates became 40 cents and 40½ cents from plants inside the district to points inside the district and 94½ cents and 90 cents from the yards outside the district to points inside the district. As a result there were rate cases before the Interstate Commerce Commission, Docket 11703, and in the order in that case the rates were advanced, effective February 1, 1921, to 40 per cent over the rates in effect August 5, 1920. The 35 per cent was withdrawn and 40 per cent substituted; that made the rates from the yards inside the district to points inside the district from 40 to 42 cents and from Bernice and points outside the district 98 cents and $1 per ton. On the complaint filed by petitioner with the Interstate Commerce Commission as to the rates from points outside the district to Chicago, Interstate Commerce Commission, Docket 11317, and other cases which were decided at the same time, the Interstate Commerce Commission entered an order that the rates from these yards outside the district would be unduly prejudicial if they exceeded the rates contemporaneously maintained inside the district by more than 10 cents per ton, so on February 16th the rates from the yards inside the district and yards outside the district became 40 cents and 50 cents per ton respectively. You will note that in this exhibit (?) there is a variation of rates for the
[fol. 79] same period and that is due to the fact that the C. & N. W., I. H. B. and C. M. & St. P. Ry. published rates in cents per hundredweight. The other lines published rates in cents per ton and the percentage of advances with the rules for the disposition of fractions made these differences in the resulting rates. This exhibit (?) is made up for the purpose of showing that for a great many years the rates for all these plants were the same and the rate in effect from 1918 up to February 26, 1922, from the plants outside was an unreasonable and discriminatory rate. The rate of 50 cents per ton that went into effect February,

1920, within the district was not in accordance with any order of the Commission. It was an arbitrary action taken by the carriers in the Chicago district. I spoke of advancing the rate inside the district from 42 cents to 50 cents per ton, effective February 16, 1921. The rates inside the district were not in issue in Docket 11317. Prior to June 25th the general switching rate was 1½ cents per hundredweight for one and two-line hauls to districts in the Chicago switching district, especially grain and coal, and I think those were the principal ones. After General Order 28 those rates were advanced 25 per cent; the 1½-cent rate became 2 cents, which rate remained in effect until the decision in Ex Parte 74, when on Illinois intrastate business it was advanced 33⅓ per cent, becoming 2½ cents, which remained until February 19, 1921, when this amended order of the Interstate Commerce Commission under that order, the 2-cent rate was advanced 40 per cent and the disposition of fractions made the rate 3 cents. July 1, 1922, it was reduced 10 per cent so that the rate to-day is 2½ cents within the Chicago switching district on general commodi-
[fol. 80] ties and on one and two-line hauls. Exhibit 5 shows the rate of 25 cents in effect on June 24, 1918, from Weber and Lansing as the same. General Order 28 prescribed an advance of 2 cents per hundredweight for brick. That made the rate on brick from Weber 65 cents and the disposition of fractions made that 70 cents. Freight Rate Authority 1887 applied to movements only within the switching district. They ignored the relationship, the competitive conditions which had always existed outside that district. Bernice is only 2 miles outside the boundary line of the switching district and carriers have always maintained those rates were the same. Freight Rate Authority 1887 was issued during the period of federal control when no attention was given to those local conditions. They simply took the lines, if that point was outside that line it didn't go. Bernice is 2 miles outside the switching district. I will produce a statement showing the freight paid by petitioner on shipments made by petitioner, from Bernice to Chicago switching district from March 1, 1920 to February 16, 1922. The freight charges are prepaid and shipments are assigned to the Illinois Brick Company or the Union Material Company. We did not receive any reimbursement or rebate from anyone for this freight. Petitioner's

Exhibit 7, in evidence (Rec., 417; Abst., 114) is a comparative statement showing the rates on brick shipped from Galewood to South Chicago via C. M. & St. P. and P. R. R., the point of origin and their destination being inside the switching district, the distance about 21.8 miles, with the shipments from Bernice, Illinois, to South Chicago over the Pennsylvania for a one-line haul, Bernice being just out-
[fol. 81] side the Chicago switching district, and South Chicago being inside, the mileage 11 miles. The comparison shows the rates for both movements from June 4, 1918 to and including February 19, 1921. I didn't put in the present prices. The present rate would be 50 cents in both cases. These two movements were selected by me as typical movements. Petitioner's Exhibit 8 (Rec., 418; Abst., 115) in evidence, is a statement showing the distance from Blue Island and Riverdale to stations on the B. & O. C. T. to which lower rates were in effect to the comparison of earnings (receipts) on that traffic with earnings (receipts) from Bernice, Illinois, to Chicago and the average to all stations in Chicago and intermediate in Illinois within the Chicago switching district. The figures 16.4 and 19.6 in Exhibit 8 are the average mileage from Bernice, Illinois, to points within the Chicago switching district in Exhibit 2 and Exhibit 4. Witness explains Exhibit 8 which speaks for itself, but the result of the explanation is that for practically the same mileage the revenue from Bernice was in excess of the ton-mile revenue from Blue Island and Riverdale. The average carload was taken from all cars shipped from all their yards in 1916. The car revenue if based on actual revenue at Bernice would be considerably more than this general average based on 37.96 tons. The load on our 2 plants on the Pennsylvania will average higher because we get larger cars. Chicago Heights is between 27 and 30 miles out of Chicago and outside the Chicago switching district and on the B. & O. C. T. and the C. & E. I. effective June 25, 1918, there was a rate of 30 cents a ton on hollow building tile from Chicago Heights to stations in Chicago on the B. & O. C. T. There were also rates on a lot of com-
[fol. 82] modities of 2 cents per hundredweight. Chicago Heights is 27 or 30 miles from Chicago but only 8 or 9 miles south from the southern lines of the Chicago switching district. It is south of Chicago and Bernice is southeast. The boundary line of the Chicago switching district is very ir-

regular. H. Peterson's tariff is Interstate Commerce Commission No. 174. It has no Illinois Commerce Commission number. That was filed during the period of federal control. It is a B. & O. C. T. tariff and was in effect from June 25, 1918 to August 20, 1918. It looks like 1918 when they made the rate. They reissue these tariffs quite frequently. That tariff was in effect until August 20, 1918, when it was canceled by the Illinois Commission No. 178. They made the rate 40 cents. The new rate is 42 cents per ton on building tile effective August 26, 1920. The hollow tile rate was 40 cents intrastate and 42 interstate. That was in effect until November 15, 1920, when the rate became 40½ cents on hollow tile for intrastate movement and remained 42 cents for interstate movement. General commodities remained 2½ cents on intrastate movement and 3 cents on interstate movement. On February 19, 1921, by I. P. U. C. 79 hollow tile rate became 42 cents a ton on both state and interstate movement and all the commodity rates became 3 cents. On February 16, 1922, the hollow tile rate was advanced to 50 cents a ton and all the commodity rates remained 3 cents. The advance on hollow tile was brought about by the general adjustment which the carriers made after the Interstate Commerce Commission rendered a decision in 11317. Those cases before the Interstate Commerce Commission covered Chicago Heights, Shermerville, [fol. 83] Glenview, Deerfield, Bernice, Lansing, and Maynard. The Commission held the rate unduly prejudicial from these points if they exceeded the rates maintained within the Chicago switching district by more than 10 cents per ton. When the carrier published 50-cent rate on brick from all these points, for a one-line haul, there was no safe absorption proportion in any of these proportions at all. The B. & O. C. T. advanced their rate on hollow tile from 42 cents to 50 cents from Chicago Heights. I suppose the tile people thought they were fortunate to get the brick rate on hollow tile. They had a lower rate on hollow tile in Illinois for 4 years than applied to brick. Hollow tile is more fragile than brick. I believe the records show it does not load as easily as brick. It is a strong competitor of brick. A cubic foot of tile weighs 40 pounds and a cubic foot of brick 80 pounds, so on an even rate they would have a great advantage over us on flat rates. With reference to the loading of brick at Bernice the cars are sent to us and

loaded the same day as a general practice, although if cars are brought in at noon they would be ready for shipment the next noon. The cars that go in the team tracks are generally unloaded within 2 days and a great many of them are unloaded the day they are placed so that the cars are not needlessly detained for loading or unloading. We occasionally have a little delay on account of the weather. Most of the brick in the Chicago switching district, particularly in the City of Chicago, is sold and delivered on the job by teams or trucks, and it is the policy of the petitioner to ship the brick into Chicago on freight cars and haul the brick from the team tracks to the job. We try to have the brick shipped as near as possible to the job to get the cars un-
[fol. 84] loaded promptly and give the customer good service. The price is a "delivered-on-the-job" price. I don't know what that includes. We pay all charges up to the job. We pay the delivering charges and the freight charges, all the delivery expenses. In selling brick we certainly meet with competition. We have to compete with the brick that is sold in Chicago and which is shipped from points within the Chicago switching district where they have had for some time a considerably lower rate than we have had from Bernice to Chicago and from Globe to Chicago. They are 2 miles apart. There is no difference with reference to the congested district within which our plant is located and through which those commodities move. A great many shipments from Bernice would not come into as congested a district as some of them inside the district. Referring to Exhibit 4, the cars shipped to 12th street, 18th street and Carpenter street would be what I would call down town and the congested district. The shipments to Englewood, Grand Crossing and 93rd and Commercial I would not consider as getting away down into town. The exhibit shows that about one-quarter of the shipments are made extremely down town.

William Allison.

Redirect examination:

When I said respondents do not serve our competitors I meant as originating carrier. They may serve our competitors as delivering carrier via two line hauls. We have filed a petition asking for reargument of I. C. C. Docket

11317. The rates shown in Petitioner's Exhibit 5, under [fol. 85] Docket I. C. C. 11317, are actually published at this time by the carriers with one exception, the Rock Island reduced that 50 cents to 45 cents on July 1st when the ten per cent reduced rate went into effect from Blue Island. All of these rates under that head were made effective February 16, 1922 except the North Western which you will note has been carried along since August 26, 1920. The Rock Island is the only road that has applied the ten per cent reduction on brick. On a shipment from Blue Island at that rate would be 45 cents to-day.

William Allison.

Cross-examination:

I know that neither of the respondents serve Chicago Heights. There are no brick plants in the Chicago switching district on the rails of either respondents. The respondents do not serve our competitors at Riverdale or directly at any point in the Chicago district. The competitors have no brick plants located on the lines of respondents. The competitors are served by railroads other than respondents but they reach the same territory that the Pennsylvania Line reaches. We know what our competitors' price is by general information for contractors and builders and consumers in Chicago. The Lake View Brick Co., Bach Brick Co. or the Alex Burke Co., all shown on Petitioner's Exhibit 3 are not served by any carrier and they are competitors of ours. In competing with those concerns we are competing with concerns that have no freight charges whatever to pay. We are at a disadvantage to the extent of the freight charges. In our 9 plants 65 or 70 per cent of the total output is sold in Chicago district. [fol. 86] We make some shipments to points outside the district. From September 1, 1920 to date we have operated all 9 of our plants. That does not include Lansing. We have operated no other plants since 1921. The average mileage shown on Exhibit 2 is based strictly on the distance from Bernice to those specified points and would apply if one car was shipped to each point, that is the same number of cars to each point, that is assuming the traffic would be equal to all of these points, that would be correct. The volume of our movements from Bernice to Hegewisch

is not nearly so great as our movements from Bernice to Carpenter street. In Exhibit 4 we show one car moving from Bernice to Hegewisch and 249 cars moving to Carpenter street. If we had taken this into consideration and showed a weighted average on Exhibit 2 the exhibit would have been different. The average mileage would have been considerably higher. The reason I said Exhibit 5 shows that the rates charged were unreasonable is that I think a 70-cent rate for a haul from Bernice against a 30-cent rate from Blue Island is a relatively unreasonable rate for the same kind of service. It is nothing unreasonable standing by itself. I think the fact that a 30-cent rate was made by order of the Commission proves conclusively that it is a reasonably compensatory rate. The 30-cent rate was made by the Railroad Administration. The assumption is that the rate previous to that was fair. When they made an advance of 25 per cent they made what they considered a reasonable rate at that time. If they didn't think it was they certainly had the power to make them whatever they pleased. Referring to Exhibit 7, the respondents do not serve Galewood. On June 24, 1918 the rate from Bernice [fol. 87] to Galewood would have been 2½ cents. It would have been the same rate, Bernice to South Chicago, for delivery on another line but not on the Pennsylvania System. In Exhibit 7 I have simply compared the rate from one point within the district to another point within the district and the rate from a point without the district to a point within the district. I did not say that the Interstate Commerce Commission in Docket 11317 fixed the rate at 50 cents. I said that they said the rate would be unduly prejudicial if it exceeded the rate contemporaneously maintained in the switching district by more than 10 cents. The rate inside the district at that time was 40 and 42 cents a ton, which made the rate from outside the district 50 cents a ton. The rates within the district were not before the Commission in that case. The Commission said that the rates from points without the district to points within the district were not unreasonable. Our plant at Bernice has not been operating to capacity since 1919. None of our plants have run to capacity in these last few years.

Evidence for Respondents

M. S. CONNELLY.

Direct examination:

Copy of the decision of the Interstate Commerce Commission in Docket 11317 received in evidence, Respondents' Exhibit 9. (Rec., 419-429; Abst., 116-129.)

I am assistant freight traffic manager of the Pennsylvania System, located at Chicago. I have been with the Pennsylvania System more than 40 years, always in the Freight Traffic Department. I have read the complaint in [fol. 88] this case and made an investigation of the rate situation. I heard Mr. Allison's testimony herein. It appeared to me this morning that there was some misunderstanding as to the application for advance in rates under General Order No. 28 of the Administration. It is generally understood by those who have never heard Mr. Paul Hastings who was connected with the Administration during the War and for some time subsequent to the Administration, that General Order No. 28 provided for an advance of 25 per cent in the freight charges of the carriers throughout the country. As a matter of fact the Administration, through the various bureaus at Washington, arrived at a fair understanding as to the actual number of tons of freight moved as to certain commodities and fixed an arbitrary advance on those commodities. I have heard Mr. Paul Hastings testify to this effect, under oath, many times, so I am perfectly sure of myself.

(Petitioner objects.)

It doesn't amount to anything, but it will make it clearer to the Commissioner just what was done and leads up to a statement I want to make. As I say, they fixed these arbitrary advances on these low heavy loading commodities and then said that on the balance of the traffic the rates will be advanced 25 per cent. When the rates were fixed under that order it meant that all rates on brick were advanced 2 cents per hundred pounds or 40 cents per net ton and that went into effect as shown by Mr. Allison's exhibits. I know from personal experience from the fact that I was chairman of the Pittsburgh District Freight Traffic Committee during the life of the Administration, that there was

a great cry from all the shippers of brick. All of those shippers who handled short-line traffic complained bitterly and insisted that the rates on brick be advanced 25 per cent [fol. 89] while the shippers of brick to long-haul points insisted that it was fair and equitable to advance rates arbitrarily 40 cents. Subsequent to the taking effect of General Order 28 the Administration issued its Freight Rate Authority 1887 which provided that the rates on long-haul traffic on brick would stay as advanced, 40 cents per ton, but that the rates for the movement of brick within the switching district, such as Chicago, would be revised so as to reflect an advance of 25 per cent instead of 40 cents per ton, which was done, as shown by the exhibit which Mr. Allison has on file. The complaints came to the Administration, made by the shippers of brick at Chicago and in the vicinity of Cleveland. I remember particularly that John Kline Company case. The Administration went into these cases very carefully at that time. These cases came to the Commission not only from Chicago and Cleveland but throughout the country wherever this same condition existed and I know of no instance where the Commission made any other decision than to the effect that there must be a dividing line and they decided that the proper dividing line was the switching limits within a destination. As a result of Report No. 74 the rates throughout the Official Classification territory were advanced 40 per cent, but, as you know, the Illinois Commission issued an order to the effect that within the State of Illinois the rates would be advanced 33⅓ per cent. Subsequently they issued a supplemental order authorizing the advance to a basis of 35 per cent and subsequently, as a result of the action taken by the carriers and the Interstate Commerce Commission, the rates between points in the State of Illinois were advanced 40 per cent. That statement I just made accounts for the rates of 93, 94½ and 98 cents per ton as shown in [fol. 90] Mr. Allison's exhibits as being applicable during the stated period from Bernice to deliveries within the Chicago district. Now, that refers to what occurred during the Administration time and gives you a rather rough general idea of what the Administration did throughout the country in the adjustment of these road-haul rates as compared to the rates within the switching district. After the railroads returned to co-operative control the John Kline

Brick Company and the Illinois Brick Company and others brought this to the attention of the Interstate Commerce Commission and everything that has been put in here this morning was put in in that case and the Commission has ruled that we were justified in the rate of 98 cents per ton. The 98-cent rate was then the rate before the 40 per cent was taken off. I want to be perfectly frank, Mr. Commissioner, and say that the Commission in this case says that if the rate is 50 cents per ton from a brick plant within the Chicago district, that the rate from Bernice and Maynard, which is served by the P. C. C. & St. L. Ry., that was the name of the road at that time, that the rates from those 2 plants we serve should not be in excess of 10 cents per ton over the going rate within the Chicago district, therefore in strict compliance with the order of the Commission in this case we should have made the rate 60 cents per ton. We fixed a rate of 50 cents per ton from Maynard and Bernice and it was the clear understanding that this would settle this thing and settle everything. The order of the Commission 11317 provided that on or before February 16, 1922 that the rates from Bernice and other outside points not within the Chicago switching district be not in excess of 10 cents per ton over rates applicable within the district. Every cost study that every railroad has made within the [fol. 91] Chicago switching district for several years past has convinced them, and it is easy to convince anyone, that this drayage, that is what I like to call it, is done at a loss. I will admit everything that Mr. Allison has said because we are all friends and have been together for years. We do not want to close up those great plants at Bernice and Maynard or any other points that we serve. We want to, as far as it is possible to do so, to keep them in competition with their competitors, I don't care where they are. When the time comes to actually fix and adjust the rates not made by the Administration or anybody else but rates that we fix, and thought there hadn't been any question at all about it, I would certainly have talked to Mr. Allison about it, but I was just as sure that this would be satisfactory to Mr. Allison, that is to say if we would make them not a rate of 10 cents higher than the competitors but as the roads decided, a rate of 50 cents per ton. We told Mr. Allison and we told Mr. Shank that we would make the rate 50 cents from those 2 great plants out there to Chicago. That

is the facts I am telling you. We could have under that order—it says there, from points within said switching district to interstate destinations within said district be not more than 10 cents per net ton. We could have put in 60 cents and they couldn't have questioned it. I don't know whether the rate was an average of 42 cents. We told you and Mr. Shank that we would reduce our rate from 98 cents to 50 cents a ton and we did it. Well, Mr. Commissioner, as I understand the issue is this, that they asked the Illinois Commission to award reparation to them between the rates that were fixed by the Interstate Commission from points without the district to the basis that was applicable [fol. 92] and fixed by the Commission between points within the district. That same thing was treated in this case much more explicitly than will be possible to put in this case and it was denied by the Interstate Commerce Commission, that is reparation, and they advised a basis for the rates from Maynard and Bernice, and we, after various conferences with the interested parties, fixed a rate that was less than we were required to make so as to put these plants at Bernice and Maynard in line with their competitors in normal conditions.

M. S. Connelly.

Cross-examination:

It is my contention that during the period of federal control and after Freight Rate Authority 1887, we could have raised the rate in question to 60 cents, but not under the finding in Docket 11317. I will say that the Interstate Commerce Commission in Docket 11317 approved as not being unreasonable the rate of 70 cents for the services we performed during that time and declined to give you any reparation. They declined to give you any reparation with the rate of 70 cents in effect at that time, said that rate was a fair and reasonable rate and as I said that we showed in that case by exhibits that 30 cents per ton was far below the actual cost to the railroad for handling it. The order in Docket 11317 says the rates were fair and reasonable but in the general adjustment of things it was suggested that they make the rates outside the district 10 cents per ton higher than the rates in the district. That is what they did in the John Kline case to which I referred. That rate is in

[fol. 93] effect to-day in Cleveland. I was chairman of the Pittsburgh District Freight Traffic Committee during the Railroad Administration. That was the committee to which the John Kline Brick Company case was referred. Their complaint came after the taking effect of Freight Rate Authority 1887. Their competitors' rates had been advanced 25 per cent. Their rates to Windcliffe had been advanced 40 cents per ton. Their complaint was sent to my committee and we approved it and sent it to the General Freight Traffic Committee. Mr. Koch is freight traffic manager of the Pennsylvania Railroad System Central Region. He was with the Pennsylvania prior to federal control. I know Howard Koch. He is freight agent of the central district at Chicago. I don't know that he presented an application in 1918 to the Railroad Administration for permission to reduce the rate of 70 cents from Bernice and other points to 30 cents. It has been my position that the rates on common brick to Bernice should be higher than the rates on common brick within the district. I do know that these rates were adjusted exactly in line with the brick adjustment at Windcliffe because it was heard just before this case was heard. I remember testifying before the Interstate Commerce Commission in Docket 11317. I stated that the rates should not be higher providing the rates were compensatory.

C. C. PLUMMER.

Direct examination:

I am special agent North Western Region, Pennsylvania System, Chicago. I have been employed by the Pennsylvania and occupied with tariff and rate matters for 7 [fol. 94] years. I have read the complaint in this case. Defendants' Exhibit 10 (Rec., 430-443; Abst., 129-133) in evidence, contains 13 sheets and was prepared by witness and shows rates on common brick in effect from principal brick producing points in the Central Trade Association territory to destinations about the same distance from the brick producing points as the destinations are from Bernice in the Chicago district, which the complaint covers. Sheet No. 1 shows that the lowest rate in effect on common brick from Canton, Ohio, was 1.26 per net ton for a distance of 12 miles. Sheet No. 2 shows that the lowest rate from

Cleveland, Ohio, was 1.54 per net ton for a distance of 34 miles, of 32 miles and of 25 miles. Sheet No. 3 shows that the lowest rate on common brick from Youngstown, Ohio, was 1.68 for distances of 20 and 21 miles. Sheet No. 4 shows that the lowest rate on common brick from Steubenville, Ohio, was $1.26 for distances of 24 and 21 miles. Sheet No. 5 shows that the lowest rate from Pittsburgh, Pennsylvania, was 1.68 for distances of 30 miles, 40 miles and 31 miles. Sheet No. 6 shows that the lowest rate on common brick from Zanesville, Ohio, was $1.26 per net ton for a distance of 15 miles. Sheet No. 7 shows that the lowest rate on common brick from Columbus, Ohio, was 1.40 per net ton for a distance of 24 miles. Sheet No. 8 shows that the lowest rate from Portsmouth, Ohio, was 1.26 for a distance of 27 miles. Sheet No. 9 shows that the lowest freight rate from Toledo, Ohio, was 1.40 per net ton for a distance of 26 miles. Sheet No. 10 comes closely on and shows the lowest rate from Danville, Illinois, to be 1.21 per net ton for distances of 12 and 36 miles. Sheet No. 11 [fol. 95] shows the lowest rate from St. Elmo was 1.08 for 6 miles. Sheet No. 12 shows that the lowest rate from Collinsville, Illinois, was 1.24½ for a distance of 14 miles. Sheet No. 13 shows that the lowest rate from Decatur was 1.21½ for a distance of 10 miles. All these sheets taken together, show that generally throughout producing points of Illinois and through points in the Central Freight Association territory on the whole, rates on brick were considerably in excess of the rates from Bernice and Lansing for similar distances. Bernice to Chicago is a line-haul movement.

C. C. Plummer.

Cross-examination:

The rates I cited are on line hauls. You will notice some large destination points which had switching districts. There are larger points than Bernice and Lansing. I can't say they are movements from points just outside a switching district to points inside a switching district. They move from points within a switching district of the producing points to points within the switching district of the destination points. The first sheet is for a movement within a switching district to a point outside and most of the destinations are the same. As I understand it, in com-

pliance with Interstate Commerce Commission Docket 10733 there were some advances and some reductions. The operating conditions prevailing in the Steubenville switching district are comparable to a certain extent with the operating conditions prevailing in the Chicago switching district. The road-haul movement from Steubenville would be accomplished very similarly to a road-haul movement [fol. 96] from Bernice. I have answered as far as I can. The rates shown in Exhibit 10 represent all rates which were subject to and modified by General Order 28 and the order of the Interstate Commerce Commission No. 74. I know the movement from Bernice to Chicago is a line-haul movement because Bernice is outside the Chicago switching district. That is not the only way I would distinguish a line-haul movement. I am not competent to say what a line-haul movement is in a technical way.

HIRAM J. WHITE.

Direct examination:

I am assistant trainmaster on the Pennsylvania Line. I have been associated with the operating department for more than 40 years and as assistant trainmaster for 12 or 15 years. I have been 22 years in the Chicago district. Bernice, Illinois, falls within my jurisdiction. Witness has prepared and identifies Defendants' Exhibit 11 (Rec. 444; Abst. 133) which is a railroad map of Chicago and vicinity, and it is received in evidence. The Pennsylvania Lines are shown in red, yellow and blue, rather prominent. The yellow line represents that part of the Pennsylvania known as the Pan Handle on which Bernice is located, at the intersection of the north and south red line. Bernice is located at the intersection of the red line with the yellow line. The red line extending along the lake is the Ft. Wayne part of the Pennsylvania, and the broad blue line in the Calumet District are the branch lines formerly known as the South Chicago & Southern, now merged with [fol. 97] the Pennsylvania. The numbers enclosed in circles of different colors represent the 26 different destinations to which the Illinois Brick Company shipped brick from Bernice between September 1, 1920 and February 15, 1922, as secured from our agent at Bernice. Some of those

destinations are located on connecting lines. Those located on the Pennsylvania Line proper are enclosed within a blue circle. The color of the circle in each instance indicates the line of railroad upon which the destination is located by referring to the legend on the map. I am familiar with the operating conditions in and around the Chicago district and the operating conditions and service required in the movement of brick from Bernice to points in the Chicago district. As to the haul from Bernice to Chicago I am not just clear in my mind what you term a line haul. I will say that brick moved from Bernice into the Chicago district is handled by a local freight train. All business to and from points within the switching district is handled by yard crews. Under agreement between the board of managers and the yard men all work within the Chicago switching limits is assigned to yard crews and yard power. Work outside the switching limits is assigned to road crews. Bernice is outside the switching limits and therefore we have road crews performing the Bernice work.

Q. This is Petitioner's Exhibit 4. Take the movements from Bernice to Carpenter street and from Bernice to Fulton and Campbell streets and explain the movement and operation necessary in getting an empty car to Bernice for loading and moving that loaded car to Fulton and Campbell streets or to Carpenter street.

[fol. 98] A. First, the empty car must be provided. There being no source of car supply in the Bernice district, cars suitable for brick handling are gathered in the Chicago district and assembled, from which point they are moved to Bernice on this local, in what you would call a road-haul movement. The distance between the yard at which these empties are assembled and Bernice is 16.3 miles. The yard is at 59th street. After the loaded brick are pulled from the brick yards, empties are spotted by the same crew for the next day's loading. The next move is to separate the cars at Bernice into three classifications, one classification moves over the Pennsylvania Lines to South Chicago, Grand Crossing, Englewood and the down town district on the Fort Wayne side of the division. The other classification moves in over the yellow line on the Pan Handle side of the division, and if there are any cars to move east that makes three classifications that is made at Bernice. The

crew that makes these classifications at Bernice hauls the cars from Bernice in over the yellow line for the Pan Handle side. Cars for Carpenter and Morgan street and Fulton street would move in over the yellow line. That crew takes cars to our classification yard at 59th street, circle 2. That is our make-up and break-up yards. The train is delivered on the track. There is a team track at 63rd and Leavitt. The 59th street yard extends from 71st street up to 55th street. The train is placed on a receiving track. After it is inspected by the inspector and side-carded for switching purposes, it is put over a gravity hump for certain classification, certain districts going on separate tracks and cars for connecting lines going on separate tracks. Cars for Carpenter or Fulton streets would [fol. 99] be placed in the Ada street classification. They are moved from 59th street to Ada street by what we term a transfer train. It is another engine and crew that moves it from 59th street to Ada street. There it is again placed in the yard and another engine and crew separates the cars for the various industries, team tracks and freight cars as the case might be and makes delivery. The yard we call the intermediate yard is located at Robey and Ada or Robey and Rockwell street. It is right opposite circle 16, along the yellow line. We have a back haul from that Ada street yard.

Q. Will you describe in the same way a movement from Bernice to say 12th street, circle 19, which would involve a movement by the red line on the Fort Wayne side?

A. The movement from Bernice to 12th street, shown on the print as circle 19, is quite similar to the movement I have just explained on the yellow line. It is handled by a local crew that moves over the red line outside the switching district. They pick this car up at Bernice and move it to our Garfield boulevard yard, which is located on the red line, about a half inch north of the intersection of the blue line between the yellow and red line opposite circle 2. You will notice it there on the print, Garfield boulevard. That is a make-up and break-up yard, similar to the one located at 59th street on the yellow line. The crew moving the car from Bernice places their train on a receiving track in Garfield boulevard yard, where the car is inspected side-carded for switching purposes and classified over the gravity hump, and then moved from the Garfield boulevard yard

to a yard known as 16th street yard right opposite the 12th street team track or in the vicinity of circle 19. After it [fol. 100] arrives at 16th street yard that train is again switched and the cars placed on the 12th street team track. The same crew that moves the car from Bernice does not move it to destination. In a movement from Bernice to Carpenter street there is a road crew, a hump crew at the classification yards, a transfer crew from the classification yard to the down town yard and another or fourth crew from the down town yard to the stopping place on the team track. There is also four crews involved in the movement from Bernice to 12th street. No different service is performed in handling brick and tile. There is no drain tile that moves from Bernice to the Chicago district. I know of no district anywhere where the terminal service is more difficult from an operating point of view than it is within the Chicago district. When a Chicago switching crew moves outside of the Chicago switching district to handle a movement they get extra pay for it. The Chicago switching crews sometimes go as far as Globe. That is not as far as Bernice. It is the first station north of Bernice. There is a rendering establishment at Globe that requires special service in handling dead animals from the stockyards and sometimes for that move, which takes two hours, we push into service a yard crew when we have to make a special run with dead animals, but ordinarily all work outside the switching district is performed by a road crew. The switching crew does not go beyond Globe.

[fol. 101] Hiram J. White.

Cross-examination:

If a car originates at Globe it is handled by the road crew at the present time. We have received no advice from the operating department that Globe is in the switching district. I do not know what is meant by taking Globe into the switching district. To explain a typical movement from Bernice to 93rd and Commercial, a car from Bernice is moved to our Colehour yard at the intersection of the two red lines. At that point the train that moves the car from Bernice sets off all cars for the Calumet district into our Colehour yard to 93rd and Commercial avenue team track where the same crew that moves the car delivers it. That

movement is simpler than the movement to Carpenter street because it does not receive the same number of handlings. In the movement from Bernice to Englewood cars are hauled by those same local crews into Garfield boulevard yard which is beyond Englewood. That is where the cars are handled, as explained before, and as the cars from Englewood are put over the gravity hump they are placed on a track along with cars going to Englewood and Grand Crossing. We have an engine leaving Garfield boulevard with cars for industries, team tracks and freight houses at Englewood and vicinity and at Grand Crossing. As a general thing that is the regular movement but there was a period, and I don't know just when that was, that we sometimes ran this Bernice local against the current of traffic from South Chicago to Englewood on the eastbound main track and would set off cars at both Grand Crossing and [fol. 102] Englewood, but as a general practice we don't do that. Traffic will not permit it. That would avoid some extra handling and save equipment but we aren't doing that as a general thing. We might have a car delivered to us by a connecting line at Dolton that might go in the vicinity of Carpenter street and the movement of that car would be to take it from the receiving track at Dolton to our 59th street yard where it is handled in a similar manner as the cars from Bernice. Dolton is within the switching district. We have two ways of moving cars out of Hegewisch. The local does all the work on the team track and freight houses at Hegewisch. If the car moves to Hegewisch, it would be pulled up by a local freight crew and handled in the same way. I am not sure Hegewisch is in the switching district. I am not prepared to testify as to the location of the district. If the car came from an industry, say the chemical works, for instance, that is, within the Hegewisch district, it would move by yard power from that point to our yard. The empties would come from the Colehour district in Hegewisch. If a car was ordered for loading at Hegewisch, it would depend on what kind of car was needed. Most of the industries in that district receive raw materials in cars. They are usually used in the return movement. We will take a car loaded at the chemical works at Hegewisch going to Carpenter street on the Pan Handle. The car moves by yard power from the chemical works at Colehour yard where it is classified and moved by transfer to Garfield

boulevard yard, where it is classified into and run off to the Pan Handle which consolidates it and then moves it to the [fol. 103] 16th street district in a consolidated run and it is there picked up by a Pan Handle crew that moves merchandise into that distract and hauled over to Carpenter street district. The movement is more complicated than a movement from Bernice to South Chicago. If the empty had to be taken to Hegewisch for loading it would come from Colehour yard to Hegewisch just the same as cars are moved from 59th street to Bernice and local freight crews pick up freight at the freight house and off the team track at Hegewisch. Local crews stop at the freight house and load and unload local freight. There are times when we have engine failures that we issue instructions for local crews to assist yard crews. We have tried to take care of the brick shipments with empties moved in the homeward direction, but have been able to supply the brick yards at Bernice to a very small extent.

J. W. La Rue.

Direct examination:

I am a special agent in the transportation department of the Pennsylvania Railroad System, Chicago. I have made an investigation and cost study of the terminal costs involved in the movement of freight in and around the Chicago district and in and around Bernice. I used the Coverston and Sauer formula and said formula was received in evidence as Respondents' Exhibit 12. (Rec., 445-489; Abst., 134-188.) This formula is designed for the ascertainment of certain operating expenses in order to determine the terminal costs of handling freight traffic. It was adopted in 1918 following the decision of the United States Supreme Court in the Minnesota rate case, 230 [fol. 104] U. S. 352. This formula does not pretend to be a 100 per cent cost study but produces generally 85 per cent or 95 per cent of the cost of the terminal service, which cost can be readily ascertained. This formula has been used in a number of cases before the Interstate Commerce Commission, among which is the Refrigeration Case, 51 I. C. C. 338, Docket 7969, Illinois Classification Case, 54 I. C. C. 1 exp. 67, Consolidated Classification Case, 54 I. C. C. Docket 10204, National Paving Brick Manufactur-

ers Association, Docket 10733, to which reference has been made here to-day, and your Brick Case, I. C. C. 11317, Docket 12349. It has also been used by other railroads among which are the New Hampshire and Erie, B. & O., Missouri Pacific, and at the present time is being used by other railroads. This formula has been revised from time to time and the Interstate Commerce Commission has given it careful consideration. As stated, it deserves careful study as being generally more extensively used in practice than any other. Of the 197 counts in the Interstate Commerce Commission Operating Classifications in Section A of the formula, we use only 49 of those counts, under Section B, 46 of those counts. An actual test on the Santa Fe in 1918 in Illinois showed that these counts actually covered 87½ per cent of the total operating expenses. I have prepared a statement showing statement of engine hour costs, in evidence as Respondent's Exhibit 13. (Rec. 490, 491; Abst., 189.) That exhibit is prepared under Section A of the formula. In order to procure these figures and the information necessary for a cost study it is necessary first for the one making the study to make a general study of the terminal in order to determine what is wanted [fol. 105] and what is required to produce that result. This study was made by me. It takes about a week to get ready. In the beginning you must first learn your terminal or secure somebody to work with you who does. I was on special duty for the trainmaster and had a thorough knowledge of yard operations in the Chicago district. I only needed somebody to help me do the work but it took about a week. If you will turn to page 4 of the formula (Respondents' Exhibit 12, p. 445) you will find shown there Form C. S. 1. It is headed "Yard Conductor's Work Report." For determining the operating expense it was necessary to secure an experienced yard conductor or yardmaster to instruct all yard conductors in advance of the study so that there would be no difficulty in its application. During the test period every conductor and every yard switch engine in the Chicago district on the P. C. C. & St. L., in addition to his other reports, personally filled out form C. S. 1 showing what he did with his time from the time he reported for duty until he was relieved from duty. The service is divided into 12 classes. The first kind of work that is shown is Classification No. 1, making up and breaking up

freight trains, showing the name of the yard, the time required, and the number of cars classified. No. 2, transfer service. This service is shown and the number of cars handled. No. 3 is what we call "interchange," handled by and from connecting roads. No. 4, weighing cars, icing cars, etc. No. 12, the industrial switching, team track service. Each man under this study was required to turn one of these in with his time attached to it. It was immediately scrutinized and if not correct was turned back to him for correction and report. On page 53 you will find a form, [fol. 106] C. S. 7. In order to ascertain the use made of tower, draw bridges or street crossings, each man on duty at each of the places designated was furnished with a card and required to tally the number of times that his tower, draw bridge or street crossing was used by our switching engines and the number of freight and passenger trains. The freight agent was required, for the period of the study, to make out form C. S. 3 shown on page 45 of the formula showing his payroll for the test period. At the smaller stations such as Bernice, each employee was required to make out form C. S. 2 shown on page 43 of the formula showing what he does with his time on each day of the test. The engine-hour cost as shown on the exhibit which has been submitted was compiled under the provisions of Section A of the elements of service stated and shown on form C. S. 1. This produced the result of 14.64 per switching engine hour for freight service. I have prepared a statement showing the output per engine hour and the cost per car for the P. C. C. & St. L. Said statement is received in evidence as Respondents' Exhibit 14. (Rec., 492; Abst., 190.) This is compiled on a basis of 14.64 per switching engine hour in the Chicago district and the average number of cars per hour as based on the engines shown on C. S. 1 as reported by the yard conductor who actually did the work. I have prepared a statement showing the cost of various elements of switching service giving the tonnage and switching costs of the P. C. C. & St. L. tracks. Said statement is received in evidence as Respondents' Exhibit 15. (Rec., 493; Abst., 191.) In order to determine what the costs are of handling specific commodities it was necessary to take all of the carloads of that specific com- [fol. 107] modity which we handled during the test period and to follow generally all these individual cars from the

time they arrived in the receiving yard at 59th street until they were released from loading at the delivery tracks and made available for other service. This study was confined to 84 cars which moved during the test period and the service of these 84 cars was applied to a total of 726 cars, making a similar movement during a period from June 25, 1918, to February 28, 1920. I have prepared another statement showing details of switching costs on carload shipments of brick from Bernice, Illinois. Said statement received in evidence as Respondents' Exhibit 16. (Rec., 494-495; Abst., 192.) This statement is compiled under Section B of the formula, Road Train Terminal Service. It is road costs allocated to this particular terminal for switching cars at Bernice during the test period as outlined in the formula. It shows a cost of $4.23 per car. I have prepared a statement which is a recapitulation of these exhibits showing the terminal cost of handling carload shipments of brick based on a test conducted October 29, 30 and 31, 1919, and applied to cars handled June 25, 1918, to February 29, 1920. Said statement is received in evidence as Respondents' Exhibit No. 17. (Rec., 496; Abst., 193.) This recapitulation does not show the cost of the line-haul movement between Bernice and 59th street. It only shows terminal costs at origin and destination. I might also say that it does not include any expense incident to the movement of empties from 59th street to Bernice or from South Chicago yard to Bernice or from any other point to Bernice which is rightfully a part of the [fol. 108] expense. We have not been able to satisfactorily work out a formula which will enable us to determine road-haul costs at the present time. This is simply the cost of the terminal operation at point of origin and the terminal operation at destination. It does not pretend to cover road-haul costs nor does it pretend to cover such items as taxes or interest on indebtedness or any profit. This exhibit, No. 17, shows that the average load of cars during the test period was 44 tons. The clerical cost was determined under Section 2 under the formula at both Bernice and Chicago. The car detention was determined at Bernice and at Chicago from the time the car was assigned to brick loading at Bernice until it left Bernice, omitting the time in transit from Bernice to 59th street and commencing again on arrival at 59th street until the car was available for other

service or was reloaded at the point where it was unloaded. These costs make a combined terminal cost of 44.4 cents per ton to which has been applied an operating ratio of 66⅔ per cent to take care of the omitted counts and taxes, interest on bonded indebtedness, etc., making a total cost of 66.6 cents per net ton. I feel safe in saying that if we were able, or had time, to produce road-haul costs with the expense of moving empties to Bernice, and the road-haul movement from Bernice to 59th street, it would easily have been one and one-half cents per hundredweight more, or 30 cents per ton more for that service, so I would say that as a result of these exhibits the less brick tonnage the road would move from Bernice with a 50 cent rate, the more money it would make. Where we have a rate that is not compensatory, the less tonnage you move the more money you make. We all known that the wages in 1919 were not [fol. 109] what they were in 1920, '21 and '22 during which movement this reparation is asked. We had this study in these other cases. In July, 1920, in comparison with 1919 the United States Labor Board showed an increase in wages alone of all classes of employees of 81.3 per cent over December, 1917. Then the United States Labor Board compared with the Railroad Administration rate shows an increase of 92 per cent over what the United States Railroad Administration advanced and when you come to the engine service, every engineer and motorman on the local, for instance, would receive 19 per cent more than the award in 1920 and 94½ per cent more than they were getting at the time this study was made. The train service employees, including your passenger men it shows it was 83.6 per cent over what they were getting at the time this study was made, so while this study showed 66.3 per cent it is a great deal lower than it would have been if the study were made at the present time. It is verified by studies that I have conducted at other places.

J. W. La Rue.

Cross-examination:

In my opinion the road-haul cost would be about 30 cents per ton. I remember testifying in Docket 11317 before the Interstate Commerce Commission. A portion of the exhibit

I offered before the Interstate Commerce Commission is not included here. Maynard is left out, but the rates of this were introduced in that case. I don't remember exactly what I said without refreshing my mind on particular questions. I have gone a great deal further on road tariff since that time. I have not made any further study with reference to shipments to Bernice. While I have not made a [fol. 110] particular study of the Bernice operation I have made studies of roads in other districts. I am not prepared to answer as to the operating ratio that was applied to the entire handling of commodities by the Pennsylvania in the year in which this test was made. Counsel for respondents thereupon stated that such operating ratio was somewhere around 97 per cent and that it was up to 100 per cent at the time of the hearing. Counsel for petitioner states that he understands the operating ratio in this case would be the per cent that the operating revenue is to the operating expense. That allows for taxes, interest, or anything else of a general character, and the operating ratio of railways in the United States for the year 1916 was 65.5. For 1917 it was 70.44; for 1918 was 81.387; and for 1919 was 85.08. The larger portion of this study covers the terminal cost only and would apply as well to a movement within the district as outside the district. It does not necessarily mean that the costs are practically the same to move a car of any other commodity within the district. It would depend entirely upon the element of service, when the car was received, and the delay the car sustained while in such service. In a movement from Hegewisch to Carpenter street where the movement was complicated, the cost of service would probably be more.

J. W. La Rue.

Redirect examination:

When I say the operating ratio was 97 per cent I mean that 97 cents out of every dollar was spent for operating and when I say the operating ratio was 66.67 per cent, I mean that 66.67 cents out of every dollar was spent for operating. When the operating ratio is lower than 97, the road is being operated cheaper than it was.

[fol. 111] **Petitioner's Exhibits**

PETITIONER'S EXHIBIT 1

Statement Showing Total Number of Cars Loaded With Common Brick and Shipped by the Illinois Brick Company from Bernice and Lansing, Ill., and the Number Shipped to the Chicago Switching District

Year	Total cars	Switching district	Per cent
1914	2546	2379	93.4
1915	2823	2703	95.7
1916	4753	4009	84.3
1917	3551	2738	77.1
1918	1297	958	73.8
1919	2603	1126	43.2
1920	2159	1019	47.2
1921	1263	942	74.5
*1922	845	673	79.6
	21840	16547	75.7

* Jan. 1 to May 1, 1922.

PETITIONER'S EXHIBIT 2

Distances in Miles from Bernice, Ill., to Principal Points in the Chicago District to Which Common Brick is Shipped

	Railroad	Miles
Washington Heights, Ill.	P. C. C. & St. L.	10
63rd Street, Chicago	"	15
Brighton Park	"	19
15th & Campbell, Chicago	"	22
Fulton & Campbell, Chicago	"	24
Carpenter Street, Chicago	"	27
Hegewisch, Ill.	Penna. R. R.	5
East Side, Ill.	"	10
South Chicago	"	11
Grand Crossing	"	15
Englewood	"	16
Chicago, 12th St.	"	23
		197
Average miles		16.4

[fol. 112] PETITIONER'S EXHIBIT 3

Statement Showing Common Brick Plants, Located in the Chicago Switching District, the Output of Which Competes with Brick from Bernice on Business in the Chicago Switching District.

Name	Location	Railroad	I. P. U. C. No.
Carey Brick Co	Galewood, Ill	C. M. & St. P	352
Tuthill Bldg. Matl. Co.	Blue Island, Ill	B. & O. C. T.	83
Calumet Brick Co.	Blue Island, Ill	B. & O. C. T.	83
Chicago Brick Co	Riverdale, Ill	B. & O. C. T.	83
Illinois Brick Co	Blue Island, Ill	B. & O. C. T. G. T.	83 60
Illinois Brick Co	Blue Island, Ill	C. R. I. & P.	251
Illinois Brick Co	Dolton, Ill	I. H. B.	114
Illinois Brick Co	Weber, Ill	C. & N. W.	316
National Brick Co	Weber, Ill	C. & N. W.	316
Alex. Burke & Sons	39th & Cicero Ave	Team Yard	...
Bach Brick Co.	Montrose & The River	Team Yard	...
Lake View Brick Co.	Diversey & The River	Team Yard	...

From all of the above plants, except Carey Brick Co. at Galewood, rate was 30 cents per ton Mar. 1, 1920 to Aug. 25, 1920, inclusive, and 40 or 42 cents per ton from Sept. 1, 1920 to Feb. 15, 1922 for single-line haul to points in the Chicago Switching District.

PETITIONER'S EXHIBIT 4

Statement of Number of Cars of Common Brick Shipped from Bernice, Ill., to Chicago and Intermediate Points for Delivery on the Penn. System.

To:	Miles	3/1/20 to 8/31/20	9/1/20 to 2/15/22	Total	Car Miles
12th St	23	13 cars	175 cars	188	4324
18th St	22	2 cars		2	44
33rd St	20		22 cars	22	440
47th St	18	22 cars		22	416
Englewood, 63rd St	16	32 cars	326 cars	358	5728
Grand Crossing	15	114 cars	244 cars	358	5370
93rd & Commercial	11	2 cars	29 cars	31	341
South Chicago	11	1 car		1	11
Hegewisch, Ill	5		1 car	1	5
Carpenter St	27	249 cars	27 cars	276	7452
Elizabeth & Carroll	27		2 cars	2	54
Robey & Carroll	25	3 cars	2 cars	5	125
Fulton & Campbell	24	125 cars	192 cars	317	7608
15th & Campbell	22	68 cars	29 cars	97	2134
47th & Leavitt	13		1 car	1	13
49th & Oakley	13	3 cars		3	39
59th & Leavitt	15	9 cars		9	135
63rd & Leavitt	15	6 cars	209 cars	215	3225
		649 cars	1259 cars	1908	37,464

Average Car Miles 19.6.

[fol. 113] PETITIONER'S EXHIPIT 5

Local Rates on Common Brick, Carloads, from Nearby Shipping Points Supplying Chicago. Applying to Industries and Team Tracks on Their Own Lines

(Rates in Cents per ton)

Shipping Point	Railroad	Miles to Chgo.	Rate 6/24 1918	Rate 6/25 1918	Rate FRA 1887 Oct. 1918	Rate 8/26 1920	Rate 2/19 1921	Rate Nov. 1920	Docket ICC 11317 Rate 2/16/22
Weber, Ill.	C&NW	13	25	70	30	40	40	40	40
Riverdale, Ill.	B&OCT	22	25	70	30	40	42	40.5	50
Blue Island, Ill.	B&OCT	18							
Blue Island, Ill.	CRIP	16	25	70	30	40	42	40.5	e50
Blue Island, Ill.	GT	20	25	70	30	40	42	40.5	f50
Dolton, Ill.	IHB	a22	25	c70	30	40	40	40	50
Lansing, Ill.	PCC&StL	28	25	70	70	93.5	98	94.5	50
Bernice, Ill.	PCC&StL	27	25	70	70	93.5	98	94.5	50
Bernice, Ill.	PRR	23	25	70	70	93.5	98	94.5	50
Chgo. Hts.	B&OCT	30	25	d70	70	93.5	98	94.5	50
Shermerville, Ill.	CM&StP	21	30	70	70	90	100	90	50

Note: Stations above the line are in the Chicago District. Those below the line are outside.

a. Elsdon 49th, Western Av., Chicago.
b. Rate June 25th, 1918 to Aug. 20th, 1918—65 cents ICC 173.
c. Rate June 25th to Aug. 1, 1918, 65 cents ICC 481.
d. Rate June 25th to Aug. 20th, 1918, 65 cents ICC 174.
e. Effective April 15, 1922.
f. Effective Mar. 14, 1922.

PETITIONER'S EXHIBIT 5—Continued

Tariff Authorities	6/24/18 I.P.U.C.	G.O.28 6/25/18 I.C.C.	FRA 1887 I.C.C.	8/26/20 I.P.U.C.	11/15/20 I.P.U.C.	2/19/21 I.P.U.C.	2/16/22 I.P.U.C.
C&NW	52	8079	1/8079	4/174	7/174	10/174	316
B&OCT	a42	177	180	65	75	83	97
CRIP	18	7/c10456	b43/18	4/251	7/251	9/251	2/344
GT	aA1419	13/A1419	46	5/46	60	2/60	2/66
IHB	a332	483	488	88	88	104	131
PCC&StL	P242	bP364	bP364	5/P364	5½/P364	8/P364	5/F307
PRR	F272	bF283	bF283	7/F283	8/F283	9/F283	5/F307
B&OCT	a42	178	178	66	76	79	96
CM&StP	79	4/79	b87	2/127	4/127	7/127	1/166

a. I. C. C. numbers.
b. I. P. U. C. numbers.

[fol. 114]

PETITIONER'S EXHIBIT 6

Statement of Distances Within Chicago Switching District Over Which Is Authorized Rate of 30 Cents per Ton of Brick, Carloads, as per Freight Rate Authority 1887

To: PRR.—W. L. Stations

P. C. C. & St. L. Stations

From:	So. Chgo.	Hegewisch	Indiana Harbor	Dolton	Riverdale	West Pullman	Washington Hts.	Eng. 59th St.	Eng. Conn. Line	Chicago
Chicago	19.5	24.8	26.8	21.5	20.7	18.3	16.2	10.4	11.6	....
Riverdale	6.5	11.2	21.2	0.8	....	2.4	4.5	10.3	11.5	20.7
Washington Heights	14.9	20.2	22.2	5.3	4.5	2.1	....	5.8	7.0	16.2

Average Distance 19.7 miles.
Average Distance 10.5 miles.
Average of Grand Total 13.6 miles.

PETITIONER'S EXHIBIT 6—Continued

Statement of Distances from Bernice and Lansing, Illinois and Maynard, Indiana to Points Within Chicago District Over Which Now Applies Rate of 70 Cents per Ton on Brick, Carloads

To: PRR.—W. L. Stations

From:	P. C. C. & St. L. Stations									
								Eng.		
	So. Chgo.	Hegewisch	Indiana Harbor	Dolton	Riverdale	West Pullman	Washington Hts.	59th St.	Conn. Line	Chicago
Bernice	10.6	5.3	15.3	5.1	5.9	8.3	10.4	16.2	17.4	26.6
Lansing	12.0	6.7	16.7	6.5	7.3	9.7	11.8	17.6	18.8	28.0
Maynard	14.1	8.8	18.8	8.6	9.4	11.8	13.9	19.7	20.9	30.1

Average distance 12.0 miles. Average Distance 14.4 miles.
Average of Grand Total 13.7 miles.

PETITIONER'S EXHIBIT 7

Comparative Statement Showing Distances and Rates Applying Between Points in the Chicago Switching District, Two-Line Hauls, and from Bernice, Ill., to Points in the Chicago Switching District on the Penn. R. R.

From	To	Via	Miles	Rate Cents per ton	Date	Tariff IPUC
Galewood, Ill.	So. Chicago, Ill.	CM&StPPRR	21.8	30	6/24/18	Lowrey 27
				40	6/25/18	Lowrey 36
				50	8/26/20	Lowrey /39
				60	2/19/21	Lowrey 4/39
				Present 50		
				25	6/24/18	PRR F 262
				70	6/25/18	F 283
Bernice, Ill.	So. Chicago, Ill.	PRR	11	93.5	8/26/20	7/F 283
				94.5	11/28/20	8/F 283
				98	2/19/21	9/F 283
				Present 50c		

[fol. 115]

PETITIONER'S EXHIBIT 8

Statement Showing Distances from Blue Island and Riverdale, Ill. to Stations on the B&OCT to Which Lower Rates Were in Effect on Common Brick, Carloads and a Comparison of Earnings on that Traffic with Earnings from Bernice, Ill.

Distances from B&OCT I. C. C. 183

To: From	Blue Island, Ill.	Riverdale, Ill.
Chicago, Ill., 12th St.	19.8	22.6
Chicago, Ill., Robey St.	17.3	20.1
Chicago, Ill., Homan Av.	18.1	20.9
Chicago, Ill., S. Kenton, 46th Av.	19.6	22.4
Austin Park	21.4	24.2
Oak Park	22.4	25.2
Forest Park	23.5	26.3
Brighton Park	14.	16.8
59th St.	9.4	12.2
Average	18.4	21.3

Average—19.8 miles

From		Average Revenue Miles	Rate cents per ton	Ton mile Revenue cents	Av. Car Loading tons	Av. Car Revenue	Date
Blue Island	B&OCT	19.8	(30	1.515	37.96	$11.39	3/ 1/20
Riverdale			(40	2. 02	37.96	15.18	8/26/20
			(40.5	2.046	37.96	15.37	11/15/20
			(42	2.121	37.96	15.94	2/19/21
			(70	4.268	37.96	26.57	3/ 1/20
			(93.5	5.701	37.96	35.49	8/26/20
Bernice	PRR	16.4	(94.5	5.762	37.96	35.87	11/28/20
			(98	5.975	37.96	37.20	2/19/21
			(50	3.048	37.96	18.98	2/16/21
			(70	3.57			
			(93.5	4.77			
Bernice	PRR	19.6	(94.5	4.82			
			(98	5.00			
			(50	2.55			

[fol. 116] **Defendant's Exhibits**

DEFENDANT'S EXHIBIT 9

Interstate Commerce Commission

No. 11317[1]

ILLINOIS BRICK COMPANY et al.

v.

DIRECTOR GENERAL, as Agent, Pennsylvania Railroad Company, Western Lines, et al.

Submitted May 13, 1921. Decided October 27, 1921

1. Rates on common brick from points outside the Chicago switching district to points within said district found not unreasonable but unduly prejudicial. Nonprejudicial basis of interstate rates prescribed for the future. Reparation denied.

2. Practice of certain defendants of refusing to absorb switching charges on shipments of common brick from Glen View and Deerfield, Ill., to certain points in the Chicago district found not unlawful.

A. R. Miller, R. W. Ropiequet, E. B. Wilkison, Robert J. McBride, Felsenthal, Struckmann & Berger, Felsenthal, Wilson & Struckmann, and Gallagher, Kohlsaat & Rinaker for various complainants.

C. A. Shank for intervener in No. 10749.

Guernsey Orcutt, K. L. Richmond, O. W. Dynes, L. P. Day, R. H. Widdicombe, H. D. Sheean; John F. Finerty, and Fred W. Held for various defendants.

Royal McKenna and John F. Finerty for Director General of Railroads.

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[1] This report also embraces No. 11395, Gary Sand-Lime Brick Company v. Director General, as Agent, Atchison, Topeka & Santa Fe Railway Company, et al.; No. 11314, Builders Brick Company et al. v. Director General, as Agent, Atchison, Topeka & Santa Fe Railway Company, et al.; and No. 10749, Lutter Brick Company v. Director General, as Agent, and Chicago, Milwaukee & St. Paul Railway Company.

[fol. 117] Report of the Commission

Division 2, Commissioners Daniels, Esch and Campbell

By Division 2:

These cases were separately heard, and proposed reports were served upon the parties. Exceptions were filed in each proceeding by one or more of the parties, and Nos. 11314, 11317, and 11395 were orally argued. On account of the similarity of the issues involved they will be disposed of in one report.

The complainants, who manufacture brick at or near Chicago, Ill., allege that the rate of 70 cents per net ton charged during certain periods since June 25, 1918, on carload shipments of common brick from various points located at short distances outside of the Chicago switching district to points within that district was unreasonable, unjustly discriminatory, and unduly prejudicial. We are asked to award reparation and to establish reasonable and nonprejudicial rates for the future. Except under circumstances not here present, our jurisdiction over intrastate rates is limited to the period of federal control. The complainant in No. 11314 also asks for our approval of reductions in intrastate rates from Chicago Heights, Ill., to Illinois points within the Chicago district, but the period provided by section 208 (a) of the transportation act, 1920, for our exercise of such power has now expired. Except where otherwise indicated, rates will be stated in amounts per net ton, and do not include the general increases of 1920.

The points of origin are Bernice, Lansing, Chicago Heights, and Glen View, Ill., and Maynard and Millers, Ind. The Chicago switching district lies principally in Illinois, but the southeastern portion extends into the state of Indiana. The points of origin are located on the lines of various defendant carriers at distances outside of the Chicago switching district which vary from 1.5 miles at Bernice to 10 miles at Millers. Thirteen brick-manufacturing plants, including many which are owned by certain of the complainants herein, are located at various points throughout the [fol. 118] district. Certain of these plants are near its outer edge. Representative of these points are Blue Island, Riverdale, and Weber, Ill., the distances from which to

many competitive destinations are approximately the same as from one or another of the points herein involved. Three of the plants within the district are so-called team yards, whose product undergoes no railroad transportation but is delivered exclusively by team or truck. Other brick plants are located at short distances outside of the switching district, including that of the National Brick Company, joint complainant in No. 11317 and intervener in No. 10749, at Deerfield, Ill., 6.7 miles north of Glen View. Brick is sold at a delivered price, the manufacturer paying the freight and cartage charges to the building operations where the brick is used. The plants within and without the district compete with each other for business in the Chicago market. The principal competitors of the Glen View plant are the plants at Weber and Deerfield, and the most important competition of the plants outside the district on the south seems to come from Blue Island and Riverdale.

Prior to June 25, 1918, the rates for single-line hauls to points within the switching district were 30 cents from Glen View and Deerfield, and 25 cents from Bernice, Lansing, Chicago Heights, Maynard, and Millers, except that for a short time prior to that date the rate from Maynard was 29 cents. Contemporaneously the rate between points in the district was generally 25 cents. On June 25, 1918, rates on common brick, including those within the switching district, were increased 2 cents per 100 pounds, or 40 cents per ton, and under the rule for the disposition of fractions, became generally 70 cents from all of these points to destinations within the district. On November 8, 1918, under freight rate authority No. 1887, of the director of traffic, United States Railroad Administration, the switching district rate was reduced to 30 cents intrastate and 40 cents interstate, but the rate from points outside the switching district to points within, state and interstate, was continued at 70 cents. This destroyed the general parity prevailing as to most of the points of origin prior to June 25, 1918, and [fol. 119] is the cause of these complaints, the contention being that the 70-cent rate was unreasonable to the extent that it exceeded the 30-cent and 40-cent rates prevailing within the district. Some of the complainants contend that the rate was unreasonable from the date of the reduction of the switching-district rates, others that it was unreasonable from June 25, 1918, and their claims for reparation are laid accordingly. The defendants contend that the 70-cent rate

was not unreasonable either from points within or without the district, and that if undue prejudice exists it is because of the unduly low basis of the subsequent reductions within the district.

The weighted average one-line haul of shipments from Bernice, Lansing, and Maynard from June 25, 1918, to February 29, 1920, was 19 miles. Complainants contrast the rate of 70 cents with the 30-cent rate from Blue Island and Riverdale for an average distance of 20 miles. They also show by way of comparison rates of 30 cents on hollow building tile, a strong competitor of brick and a higher priced commodity, and 40 cents on pianos, organs, bottles, acids, lockers, and iron and steel articles from Chicago Heights to points within the switching district, a distance of about 30 miles; 70 cents on hollow building tile from Kankakee, Ill., to Chicago, 54 miles; 50 cents on sand and gravel from Libertyville, Ill., to Chicago, 35 miles; and 55 cents on the same commodity from Milwaukee, Wis., to Chicago, 85 miles. It is contended that sand and brick are analogous or competitive. Complainants also stress the fact that prior to June 25, 1918, the brick rates were practically equalized in all important cases from points inside and outside the district.

Defendants compare the rates assailed with rates on common brick in various parts of the country for hauls of from 2 miles to 33 miles at rates ranging from 80 cents to $1.30 and with rates under the Illinois distance tariff higher than the rates complained of. Comparison is also made of the 70-cent rate from Chicago Heights for 27 miles with the Chicago & Eastern Illinois rate of 80 cents on brick other than common brick, also hollow building tile, between the same points, and with numerous rates on brick ranging from 70 cents to $1.10 for distances of from 3 miles to 50 [fol. 120] miles on the Chicago & Eastern Illinois in Illinois and Indiana, all of which apparently reflect the flat increase of 40 cents. Exhibits were also introduced by defendants showing line-haul rates on common brick from nine different producing points in Ohio and Pennsylvania, and Michigan, these rates ranging from 90 cents to $2.10 for an average distance of approximately 38 miles.

Calculations were submitted by various defendants purporting to show the approximate cost of the service rendered under the rate assailed. One cost study applies to cars actually moving from Bernice and Maynard during the

period from June 25, 1918, to February 29, 1920. The figures do not include all items of cost but only such as can be allocated to this service with some degree of certainty. They cover only terminal costs at point of origin and at and beyond the classification yard in the switching district, nothing being added for the line haul. The combined terminal cost thus obtained is 40.5 cents per ton, which, because of the omissions mentioned, is estimated to represent only about 85 per cent of the total cost. By the application of this percentage approximately 47.5 cents is obtained as the cost per ton of the transportation service, without applying an operation ratio.

A cost study of typical shipments by the Chicago & Eastern Illinois from Chicago Heights to points in the switching district purports to show a cost of from $21.26 to $38.47 per car, while the freight charges range only from $22.40 to $35.47 per car. A second study, based on a statistical analysis of the Chicago & Eastern Illinois for the calendar year 1919, purports to show the cost of moving a car of 35 net tons of brick from Chicago Heights to a point on the Chicago & Eastern Illinois in the switching district to be $25.37, while the freight charges on the shipment would be only $24.50. A cost study of all traffic of the Baltimore & Ohio Chicago Terminal for the calendar year 1919, including 6 per cent on the book value of its property, purports to show an average cost of 68.7 cents per net ton, compared with the average revenue of this line for all freight of only 30 cents per net ton. Another cost study for this line purports to show a cost for moving brick from Chicago Heights [fol. 121] of from $21.36 to $30.28 per car.

No comparison was offered of the relative costs of moving brick from brick plants within the switching district. The complainants criticize the studies submitted as being based largely upon assumptions. Making all necessary allowances, it seems reasonably certain that a rate of 30 cents would be considerably less than the actual out-of-pocket cost.

Although pressing the allegation of intrinsic unreasonableness, the principal grievance which is sought to be corrected is the manifest injustice of the spread of 40 cents, in most cases, which exists in favor of the points within and against the points outside, to Chicago district destinations. Chicago is the principal market for the product of the com-

plainants, and the present advantage in freight rate which is enjoyed by the plants within the district over those outside is obvious. The latter claim that they must shrink their profits accordingly by equalizing their preferred competitors' rates. But it is also true that complainants are in competition with other plants in Chicago which are at no expense at all for freight transportation, making deliveries direct from their plants.

The records are clear that it was the intention of the Railroad Administration to apply the flat increases, where such were specifically provided, to line-haul rates generally throughout the country, including hauls complete within themselves from shipper to consignee between two points within the switching limits of a city or district. But the interpretation of general order No. 28 was not always uniform as to complete hauls when entirely within a district, and in some cases and on some commodities the general 25 per cent increase was applied to the existing rate. The purposes of the flat increase as stated by defendants, were, first, to maintain relationships between different points of production; and, second, to apply to short hauls an increase which would be larger in proportion than that applying to the longer hauls, because it was a matter of common knowledge that a great many of the short-haul rates, not only on brick but on other low-grade commodities, were so low as [fol. 122] to be less than the actual cost and less than their fair share of transporting traffic as a whole. As long as the flat increase on brick was applied both inside and outside of the Chicago district no serious maladjustment arose. But the increase on some of the commodities taking the flat advance, when applied to industrial switching, had the effect of making extraordinarly high charges on interterminal, intraterminal, and intraplant switching where large stocks had been accumulated at the request of the War Industries Board. To meet this situation the rates were reduced by the director of traffic to the basis of 25 per cent above the former switching rates, consistently with the increase in switching charges not covered by the flat increases, and in consequence of the new adjustment the brick interests outside of the Chicago district, whose principal competition is not with plants having line-haul rates but switching-district rates found themselves discriminated against.

Defendants maintain that if the prayer of complainants is granted it will amount virtually to an extension of the Chicago switching district over an additional zone of 10 miles, that other commodities just outside the present limits can present as meritorious a case for inclusion within the district as the brick interests do herein, and that there will be no limit to the boundary, already distended, within which Chicago rates should apply. Complainants reply that they are only asking for the restoration of a parity which formerly existed, and that on a commodity such as brick in which the freight cost is such a material factor, the existing difference in the freight rate, inside and outside the district, will result in the loss to them of their most important market.

The situation is not unlike that arising in connection with the delimitation of rate groups. The line must be drawn somewhere. So here the limits of the switching district determined under the Lowrey tariffs many years ago as the result of prolonged conference and negotiation between carriers and shippers, should not be reconstructed by us on the record now before us.

In Vaughan's Seed Store v. C., M. & St. P. Ry. Co., 59 [fol. 123] I. C. C., 537, the complainant, located at Morton Grove, Ill., a point on the Chicago, Milwaukee & St. Paul, hereinafter called the Milwaukee, 14.3 miles north of Chicago, and intermediate to Glen View but outside the Chicago switching district, complained that the rates on onion sets from Morton Grove to certain points east of Chicago were unduly prejudicial to the extent that they exceeded the Chicago district rates to the same destinations which were enjoyed by complainant's competitor at Des Plaines, Ill., a point on the Chicago & North Western, 16.6 miles from Chicago but within the switching district. Morton Grove and Des Plaines are about 6 miles apart, and connected only by wagon road. In dismissing the case we said:

The different bases of rates applicable from Morton Grove and Des Plaines are due primarily to the inclusion of the latter and the noninclusion of the former within the Chicago switching district, and defendants urge that the limits of this district should not be extended beyond the extremity of the manufacturing district to include Morton Grove. It was testified on their behalf that onion sets are not produced to a material extent within the switching dis-

trict or at any point on the Milwaukee within that district, and that if the Chicago basis of rates is applied to this commodity from Morton Grove, the out-bound traffic from which consists of farm or market-garden products, in all probability demand would be promptly made for the same rate basis on onion sets and other garden produce from points farther distant.

In the present case the principle involved is much the same, except that considering the nature of the commodity, we are convinced that the spread between the rates within and without the district which existed after the reduction of the rates following freight rate authority No. 1887 should not have exceeded 10 cents per net ton, and should not now exceed this amount so far as interstate rates are concerned.

Since the hearings herein the general increases authorized by us on August 26, 1920, have become effective, so that the rates in effect at the present time are those herein dealt [fol. 124] with plus 40 per cent. Necessarily no comparisons of existing rates are contained in the records.

In No. 10749 it is also alleged that the rate of 80 cents charged on and after June 25, 1918, on shipments of common brick from Glen View to Evanston, Ill., were unjust, unreasonable, and unduly prejudicial; also that the failure of defendants to provide for the absorption of switching charges on shipments of common brick from Glen View to points within the Chicago switching district on lines other than the Milwaukee, when the line-haul rate is 50 cents (2.5 cents per 100 pounds) or more, minimum charge $15 per car, subjects complainant and its commodity to undue prejudice and unduly prefers the commodities on which such absorptions are made.

Evanston is 25 miles from Glen View by the single line of the Milwaukee, and the haul is through the center of Chicago. Complainant's principal competition at Evanston comes from Weber, from which point to Evanston the rate is 30 cents, but there is testimony to the effect that the movement for the short distance is wholly by truck.

The other question presented is whether the complainant and intervener in this proceeding are entitled to the benefit of a switching absorption out of the line-haul rate on Chicago deliveries. The Lowrey tariff, series 20, adopted in 1911 by the various carriers entering Chicago, provided,

with certain exceptions, for the delivery of carload shipments from points beyond to points within the switching district on lines other than the line-haul carrier without charge in addition to the line-haul rates to Chicago, where the line-haul rate was 2.5 cents per 100 pounds or more and the freight charges were $15 per car or more. The Milwaukee makes an exception as to brick from Deerfield, Glen View, and Shermerville, Ill., the last point being a brick-manufacturing point intermediate to the other two.

A witness for the Milwaukee testified that in establishing the $15 minimum charge for shipments on which switching charges would be absorbed, this amount was fixed in contemplation of traffic which ordinarily carries a much [fol. 125] higher revenue. It was explained that if an exception were not made from the last three mentioned points, the Milwaukee in most cases would not receive enough gross revenue from such shipments to pay the terminal costs accruing to other lines.

We have several times recognized the propriety of the action of various carriers reaching Chicago in excepting certain commodities and classes of traffic from the provisions of the Lowrey tariff. Rates on Hay to Chicago, 34 I. C. C., 150, and cases therein cited.

We find that the rates under attack were not and are not unreasonable, but that they were, are, and for the future will be unduly prejudicial to the extent that the rates from the points outside of the Chicago district exceed the rates from points inside of that district to interstate destinations therein by more than 10 cents per net ton. Complainants and intervener have not shown themselves entitled to damages as a result of such undue prejudice. We further find that the failure of defendants in No. 10749 to provide for the absorption of switching charges to points in the Chicago switching district on lines other than the St. Paul was not unlawful during federal control and is not unlawful as to interstate traffic.

An appropriate order will be entered.

64 I. C. C.

Order

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 27th day of October, A. D. 1921.

No. 11317

ILLINOIS BRICK COMPANY and NATIONAL BRICK COMPANY

v.

JAMES C. DAVIS, Director General of Railroads, as Agent; The Pennsylvania Railroad Company, Western Lines; and The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company

[fol. 126] No. 11395

THE GARY SAND-LIME BRICK COMPANY

v.

JAMES C. DAVIS, Director General of Railroads, as Agent; et al.

[fol. 127] No. 11314

BUILDERS BRICK COMPANY and NATIONAL BRICK COMPANY

v.

JAMES C. DAVIS, Director General of Railroads, as Agent, et al.

[fol. 128] No. 10749

LUTTER BRICK COMPANY

v.

JAMES C. DAVIS, Director General of Railroads, as Agent, and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before February 16, 1922, and thereafter to abstain, from

publishing, demanding, or collecting for the transportation of common brick, in carloads, from Bernice, Lansing, Chicago Heights, and Glen View, Ill., and Maynard and Millers, Ind., to interstate destinations within the Chicago switching district rates which exceed the rates contemporaneously maintained by them on like traffic from points within said district to interstate destinations within said district by more than 10 cents per net ton.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to established, on or before February 16, 1922, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of common brick, in carloads, from Bernice, Lansing, Chicago Heights, and Glen View, Ill., and Maynard and Millers, Ind., to interstate destinations within the Chicago switching district rates which shall not exceed the rates contemporaneously maintained by them on like traffic from points within said switching district to interstate destinations within said district by more than 10 cents per net ton.

[fol. 129] And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, Division 2.

George B. McGinty, Secretary. (Seal.)

Defendant's Exhibit 10

Statement Showing Rates, With Tariff Authority, on Common Brick Between Short-haul Points (Distances of 55 Miles or Less), in the Districts Shown Below During the Period Sept. 1, 1920 to Feb. 16, 1922

Sheet No. 1

To	Mileage	From Canton District Canton, Ohio — Rate per 2,000 pounds	Tariff Authority
Akron, Ohio	23	$1.40	PRR-WL
Alliance, Ohio	18	*1.40	ICC F-1061
Bedford, Ohio	48	1.82	Sup. No. 13
Chagrin Falls, Ohio	52	1.82	Effective
Coshocton, Ohio	55	1.82	8/26/20
Dover, Ohio	24	1.40	
Leetonia, Ohio	38	1.82	
Massillon, Ohio	9	1.40	
Minerva, Ohio	19	*1.40	
Maximo, Ohio	12	†1.26	
New Comerstown, Ohio	39	1.68	
Oneida, Ohio	17	1.40	
Orrville, Ohio	23	1.40	
Ravenna, Ohio	36	1.54	
Warren, Ohio	51	1.82	

*$1.15 Effective July 28th, 1921 in Sup. No. 21
1.40 Effective Nov. 5th in Sup. No. 23
†$1.15 Effective July 28th, 1921 in Sup. No. 21
1.26 Effective Nov. 5th, 1921 in Sup. No. 23

[fol. 130]

Sheet No. 2

To	Mileage	From Cleveland District Cleveland, Ohio — Rate per 2,000 pounds	Tariff Authority
Akron, Ohio	34	$1.54	PRR-WL
Alliance, Ohio	55	1.82	ICC F-1061
Creston, Ohio	50	1.82	Sup. No. 13
Cuyahoga Falls, Ohio	34	1.54	Effective
Huron, Ohio	51	1.96	8/26/20
Kent, Ohio	32	1.54	
Hudson, Ohio	25	1.54	
Spencer, Ohio	44	1.68	

Sheet No. 3

To	Mileage	From Mahoning District Youngstown, Ohio — Rate per 2,000 pounds	Tariff Authority
Akron, Ohio	53	$1.82	PRR-WL
Bedford, Ohio	54	1.82	ICC F-1061
Hudson, Ohio	46	1.82	Sup. No. 13
Newton Falls, Ohio	20	1.68	Effective
Oneida, Ohio	55	1.82	8/26/20
Phalanx, Ohio	21	1.68	
Ravenna, Ohio	34	1.82	

DEFENDANT'S EXHIBIT 10—Continued

Sheet No. 4

To	Mileage	From Steubenville District Steubenville, Ohio — Rates per 2,000 pounds	Tariff Authority
Bellaire, Ohio	24	$1.26	PRR-WL ICC F-1061 Sup. No. 13 Effective 8/26/20
Bowerston, Ohio	38	1.82	
Martins Ferry, Ohio	21	1.26	
Jewett, Ohio	27	1.82	
Minerva, Ohio	49	1.82	
Neffs, Ohio	32	1.82	
Oneida, Ohio	52	1.82	

Sheet No. 5

To	Mileage	From Pittsburgh District Pittsburgh, Pa. — Rates per 2,000 pounds	Tariff Authority
Beaver Falls, Pa	30	$1.68	PRR-WL ICC F-1061 Sup. No. 13 Effective 8/26/20
East Liverpool, Ohio	45	1.82	
East Palestine, Ohio	50	1.82	
New Castle, Pa	50	1.82	
New Gallalee, Pa	40	1.68	
Wampum, Pa	41	1.82	
Washington, Pa	31	*1.68	

* ICC P-1200 Supp. No. 11 Effective 8/26/20

[fol. 131]

Sheet No. 6

To	Mileage	From Zanesville District Zanesville, Ohio — Rates per 2,000 pounds	Tariff Authority
Coshocton, Ohio	29	$1.40	PRR-WL ICC F-1061 Sup. No. 13 Effective 8/26/20
Dresden, Ohio	15	1.26	
Newark, Ohio	25	1.54	
New Comerstown, Ohio	41	1.82	
New Lexington, Ohio	22	1.40	
Shawnee, Ohio	36	1.40	

Sheet No. 7

To	Mileage	From Columbus District Columbus, Ohio — Rates per 2,000 pounds	Tariff Authority
Bellefontaine, Ohio	53	$1.82	PRR-WL ICC P-1200 Sup. No. 11 Effective 8/26/20
Bremen, Ohio	42	1.68	
Delaware, Ohio	24	1.40	
So. Charleston, Ohio	36	1.54	
Springfield, Ohio	45	1.54	
Urbana, Ohio	47	1.54	
Washington, Ohio	39	1.68	
Xenia, Ohio	55	1.82	

DEFENDANT'S EXHIBIT 10—Continued

Sheet No. 8

To	Mileage	From Southern Ohio District, Portsmouth, Ohio Rates per 2,000 pounds	
Chillicothe, Ohio	49	$1.54	N&W Tariff 13333-F ICC 6461 Effective 9/1/20
Ironton, Ohio	27	1.26	N&W Tariff 13333-G ICC 6766 Effective 11/1/20

[fol. 132]

Sheet No. 9

To	Mileage	From Toledo District Toledo, Ohio Rates per 2,000 pounds	Tariff Authority
Maple Grove, Ohio	34	$1.54	PRR-WL ICC F-1061 Sup. No. 13 Effective 8/26/20
Bellevue, Ohio	45	1.68	
Limestone, Ohio	20	*1.54	
Carey, Ohio	50	1.54	
Defiance, Ohio	51	1.82	
Oak Harbor, Ohio	26	*1.40	
Sandusky, Ohio	47	1.82	
Tiffin, Ohio	42	1.54	
Burgoon, Ohio	30	1.54	

*W&LE Tariff 14-B-ICC 1234 Effective 9/ 1/20
W&LE Tariff 14-C-ICC 1351 Effective 5/25/21

Sheet No. 10

To	Mileage	From Danville, Illinois Rates per 2,000 pounds			Tariff Authority
		†	‡	*	C&EI 5400-E ICC 3052
		to 11/15/20	11/15/21 to 2/19/21	2/19/21 to 2/16/22	
Alvin, Ill	12	$1.20	$1.21½	$1.26	
Bronson, Ill	36	1.20	1.21½	1.26	
Stockland, Ill	40	1.46½	1.48½	1.54	
Watseka, Ill	45	1.46½	1.48½	1.54	

† Sup. No. 21
‡ Sup. No. 22
* C&EI 5400-F ICC 3217

DEFENDANT'S EXHIBIT 10—Continued

Sheet No. 11

To	Mileage	From St. Elmo, Illinois Rates per 2,000 pounds † to 11/28/21	‡ 11/28/21 to 2/19/21	* 2/19/21 to 2/16/22	Tariff Authority ICC P-1247
Altamont, Ill.	6	$1.06½	$1.08	$1.12	
Effingham, Ill.	17	1.20	1.21½	1.26	
Montrose, Ill.	27	1.20	1.21½	1.26	
Jewett, Ill.	x35	1.33½	1.35	1.40	

† Sup. No. 14
‡ Sup. No. 14½
* Sup. No. 18
x These rates also apply for distances up to 60 miles.

[fol. 133]

Sheet No. 12

To	Mileage	From Collinsville, Ill. Rates per 2,000 pounds † to 11/28/21	‡ 11/28/20 to 2/19/21	* 2/19/21 to 2/16/22	Tariff Authority ICC P-1247
St. Jacobs, Ill.	x14	$1.20	$1.21½	$1.26	
Hagerstown, Ill.	51	1.33½	1.35	1.40	

† Sup. No. 14
‡ Sup. No. 14½
* Sup. No. 18
x These rates also apply for distances from 15 to 50 miles.

Sheet No. 13

To	Mileage	From Decatur, Ill. Rates per 2,000 pounds † to 11/28/20	‡ 11/28/20 to 2/19/21	* 2/19/21 to 2/16/22	Tariff Authority ICC P-1247
Herrvey City, Ill.	10	$1.20	$1.21½	$1.26	
Lovington, Ill.	x22	1.33½	1.35	1.40	

† Sup. No. 14
‡ Sup. No. 14½
* Sup. No. 18
x These rates also apply for distances up to 60 miles.

DEFENDANT'S EXHIBIT 11

Defendant's Exhibit 11, map of Pennsylvania Lines in Chicago and vicinity showing thereon the railroad tracks of Pittsburgh, Fort Wayne and Chicago Railway and South Chicago and Southern Railroad in red and the railroad

tracks of Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company in yellow, and showing the following points by colored circles on said map.

1. Fulton and Campbell.
2. 63rd and Leavitt.
3. Ravenswood, Illinois.
4. 15th and Campbell.
5. Robey and Carroll.
6. Deering St. Station.
7. Webber Yard.
8. Carpenter Street.
9. Clyde Team.
10. 100th Street and Calumet River.
11. Berwyn, Ill.
12. Riverside, Ill.
13. Cicero, Ill.
14. 11th Street, Chicago.
15. Central and Colorado Avenues.
16. Elizabeth St. and Carroll Ave.
17. Brookfield, Ill.
18. Grand Crossing, Ill.
19. 12th Street, Chicago, Ill.
20. 93rd and Commercial.
21. 118th St. and Calumet River.
22. Englewood, Illinois.
23. 33rd Street, Chicago, Ill.
24. 65th and State Streets.
25. Hegewisch.
26. Graselli, Indiana.

[fol. 134] The different colors of the circles indicate that said place is on the railroad of one of the following: Pennsylvania Company; Chicago and North Western Railway Co.; Chicago, Burlington and Quincy Railroad Co.; Belt Railroad; Indiana Harbor Belt Railroad; Baltimore and Ohio Chicago Terminal Railroad; Chicago and Western Indiana Railroad; Pittsburgh, Cincinnati, Chicago and St. Louis Railroad; Pittsburgh, Fort Wayne and Chicago Railway and South Chicago and Southern Railroad.

The said map is not a map of the Chicago switching district.

Defendant's Exhibit 12. Formula for the assignment of certain operating expenses to determine the terminal cost of handling freight traffic, compiled by H. E. Coverston, special Agent, C. C. C. & St. L. Ry., Cincinnati, Ohio, and E. F. Saur, special agent, Pennsylvania System, Indianapolis, Indiana, June 1, 1920, as follows:

DEFENDANT'S EXHIBIT 12

Formula for the Assignment of Certain Operating Expenses, to Determine the Terminal Cost of Handling Freight Traffic

An analysis of the operating expense accounts will disclose the fact that the principal costs of terminal service can be ascertained readily, while to make a complete apportionment of all expense accounts would involve considerable expense and it is questionable whether the differ-

ence in the result, in all cases, would warrant the increased cost.

This formula is designed to cover such accounts as can be readily apportioned and have a direct, rather than a remote, relation to terminal costs; and for this reason it will produce results that are representative and at the same time conservative.

Where point facility bills are rendered against carriers making the study, the recipient of such joint facility bills should redistribute them to the primary accounts. The [fol. 135] amount so redistributed should be considered as expense incurred by the carrier making the study, and included in the apportionment as specified by the formula. This presupposes that carriers receiving credit for such bills will, in reducing the elements of cost, take into consideration all of the costs involved; that is to say, due consideration will be given to the total number of cars, engines, etc., involved in arirving at the unit cost to be applied.

In finding the operating cost of facilities that are used for the carriers' own benefit, as well as for other companies, consideration should be given to all of the units handled and all of the expenses. In assigning this particular expense to the carrier's total terminal costs, only those units that pertain to their own traffic should be included. This can be determined by multiplying their own units by the unit cost previously ascertained.

It should be understood that where the records of the carrier shown expenses allocated direct, such amounts should be used in preference to the basis of apportionment prescribed in the formula.

In order that this formula may be applicable to the terminal expenses of handling both carload and less carload traffic, three general divisions are necessary.

I. Platform costs.

II. Clerical costs.

III. Switching and other costs.

In ascertaining terminal costs of handling "L. C. L." freight, use will be made of all of the three factors, while for "C. L." freight the platform costs will be omitted as they are not involved.

Terminal expenses are those which attached to, are connected with, or are occasioned by the receiving, load-

ing or otherwise preparing traffic for movement, at originating station, or junction point with foreign line, and the unloading, delivery and other outlay incident to the disposition of the traffic at destined station or junction point with foreign line.

By "Terminal Tonnage" is meant tonnage originating at and destined to the station under review, including freight received from or delivered to connecting lines at that station.

By "Through Tonnage" is meant tonnage transferred, [fol. 136] going beyond transfer point over carrier's own rails; also freight interchanged between two or more divisions or branches of the same railroad.

By "Expenses Used" is meant the amounts determined under the specifications of this formula as chargeable to the service under review at each selected station during the test period.

To insure comparable figures in conducting cost studies where more than one carrier is interested, it is desirable that all studies cover a period of the same length; however, it is not necessary that all roads conduct studies simultaneously, also, where the formula provides that unit costs covering a period be used, all carriers should use the same one year period.

The "Test Period" should be of sufficient length to secure representative average performance and expenses, and a seven day test period is suggested with a two day preliminary or educational period in which to instruct employees relative to the proper compiling of the various blanks. The data covering the two preparatory days will be discarded.

A copy of each of the blank forms mentioned and a list of the units necessary for a proper application of this formula is included herein; however, in special cases, additional units may be necessary.

Copies of suggested "Exhibit Forms" are appended. Where exhibits are submitted to the Interstate Commerce Commission they should be printed upon one side only of sheets not exceeding 12½ inches from top to bottom by 22 inches in width, with binding margin of 1½ inches on left side of sheet.

Platform and Clerical Costs

Account 373—Station Employes—Apportion this account as between platform and clerical expense on the basis of the cost of each class of service.

At stations where employes perform more than one class of service, use "Form C. S. 2, Time Study," blank, to ascertain the division of the wages paid each employe. A recapitulation of the total expenses at each station should be made on "Form C. S. 3."

At exclusive freight stations "Form C. S. 3," will be used to separate the expenses as between the various kinds of service.

[fol. 137] In developing the percentages on "Form CS-2," which are to be applied to the salaries paid station employes to determine the proportion chargeable to the various classes of service performed, the time devoted to the handling of Western Union or Express business should be omitted, if either of these companies pay the employee for such service direct or through the agent. In case the commissions paid by these companies are retained by the carriers the time devoted to these services should be included.

The expense of receiving and delivery clerks, whose time is devoted exclusively to receiving and delivering freight, should be charged to terminal freight only, as they do not handle through tonnage.

At points where the time of station employees devoted to registering, expensing or otherwise handling of "Through (Overhead) Billing" is sufficient to warrant, such time and expense will be eliminated (by a time study of the individual employees affected) before the cost per consignment of other office expense is determined.

By "Through (Overhead) Billing" is meant through way-bills covering freight received from and delivered to connecting lines, at the station under review, as this billing is not taken into station account.

[fol. 138]

I. Platform Costs

Account	Basis of Apportionment
M. of W. & S. Expenses	
227—Station and Office Buildings.	Ascertain the cost of repairs for one year to the station buildings in the terminal under review; reduce to the time covered by the test period and apportion between office and warehouse and platform, on the basis of occupancy, considering each building on its merits. Charge the warehouse proportion to terminal. Divide the proportion chargeable to platforms on basis of terminal and through tons handled. Divide the terminal proportion of this expense by the terminal tonnage handled to obtain the cost per hundred pounds.
201—Superintendence. 274—Injuries to Persons. 275—Insurance. 276—Stationery and Printing. 277—Other Expenses.	Determine the percentage proportion of M. of W. & S. expenses used, of the total M. of W. & S. expenses, exclusive of Accounts 201, 274, 275, 276 and 277, and apply this per cent to the amount charged to Accounts 201, 274, 275, 276 and 277 to obtain the proportion of those accounts chargeable to platform, and divide by the terminal tonnage handled to obtain the cost per hundred pounds.
Transportation Expenses	
273—Station Employees.	Apportion the expenses assigned to platform between terminal and through tonnage on basis of the two classes of tons handled per "Form C. S. 4." Divide the terminal proportion by the terminal tonnage handled to obtain the cost per hundred pounds.
376—Station Supplies and Expenses.	Apportion on the basis of assigned charges in "Account 373—Station Employees," and divide by the terminal tonnage handled to obtain the cost per hundred pounds.
371—Superintendence. 410—Stationery and Printing 411—Other Expenses. 414—Insurance.	Determine the percentage proportion of Transportation expenses used, of the total Transportation expenses, exclusive of Accounts 371, 410, 411 and 414, and apply this percent to the amount charged to Accounts 371, 410, 411 and 414 to obtain the proportion of those accounts chargeable to platform, and divide by the terminal tonnage handled to obtain the cost per hundred pounds.
General Expenses	
451—Salaries and Expenses of General Officers. 452—Salaries and Expenses of Clerks and Attendants. 453—General Office Supplies and Expenses. 454—Law Expenses. 455—Insurance. 458—Stationery and Printing. 460—Other Expenses.	Apportion on the basis that the amount used, of the above M. of W. & S., and Transportation accounts, bears to the total of all Operating Expense accounts, and divide by the terminal tonnage handled to obtain the cost per hundred pounds.

A total of the amounts obtained by the above specifications will represent the cost per hundred pounds for platform service.

[fol. 139] II. Clerical Costs

Account	Basis of Appointment
M. of W. & S. Expenses	
227—Station and Office Buildings.	Ascertain the cost of repairs for one year to the station buildings in the terminal under review; reduce to the time covered by the test period and apportion between office, warehouse and platform, on the basis of occupancy considering each building on its merits. Divide the proportion chargeable to freight office on the basis of "C. L." and "L. C. L." consignments.
201—Superintendence. 274—Injuries to Persons. 275—Insurance. 276—Stationery and Printing. 277—Other Expenses.	Determine the percentage proportion of M. of W. & S. expenses used, of the total M. of W. & S. expenses, exclusive of Accounts 201, 274, 275, 276 and 277, and apply this percent to the amount charged to Accounts 201, 274, 275, 276 and 277 to obtain the proportion of those accounts chargeable to clerical cost.
Transportation Expenses	
373—Station Employees.	Apportion the expenses assigned to clerical work performed on terminal freight, between "C. L." and "L. C. L." on basis of the number of consignments of each as per "Form C. S. 4."
376—Station Supplies and Expenses.	Apportion on the basis of assigned charges in "Account 373—Station Employees."
371—Superintendence. 410—Stationery and Printing. 411—Other Expenses. 414—Insurance.	Determine the percentage proportion of Transportation expenses used, of the Total Transportation expenses, exclusive of Accounts 371, 410, 411 and 414, and apply this percent to the amount charged to Accounts 371, 410, 411 and 414 to obtain the proportion of those accounts chargeable to clerical costs.
General Expenses	
451—Salaries and Expenses of General Officers. 452—Salaries and Expenses of Clerks and Attendants. 453—General Office Supplies and Expenses. 454—Law Expenses. 455—Insurance. 458—Stationery and Printing. 460—Other Expenses.	Apportion on the basis that the amount used, of the above M. & W. S., and Transportation accounts, bears to the total of all Operating Expenses accounts.

If it is desired to obtain the clerical cost per hundred pounds, divide the "L. C. L." proportion of the clerical expenses by the terminal platform tonnage.

In case it is desired to determine the clerical cost per hundred pounds of some particular kind of traffic, it will be necessary to multiply the number of con-
[fol. 140] signments involved by the average cost per consignment and divide the amount thus obtained by the tonnage of the particular kind of traffic under consideration.

Before calculating the cost per consignment at stations where the expense of local car record clerks is sufficient to warrant a separate car record organisation as indicated in Item 15, "Form C. S. 3," such expense should be separated on the basis of loaded cars recorded ("C. L." vs. "L. C. L."). The expense of demurrage clerks, as per Item 14, "Form C. S. 3," should be charged direct to "C. L." business.

If it is desired to obtain the clerical cost per car of "C. L." freight, divide the office expense assigned to handling "C. L." freight by the number of "C. L." consignments handled, making proper allowance where two or more consignments of "C. L." freight are loaded in the same car.

III. Switching and Other Costs

By reason of the difference in conditions at stations where switch engines are maintained, and stations where the switching is performed by the local freight train or a switch run, it is necessary to consider there two classes of stations separately, which is done in Sections "A" and "B" respectively.

If the services described in both Sections "A" and "B" are furnished to the kind of traffic under review, the cost of both services should be included.

Section "A"—Yard Switching Service.

At stations where regular switch engines are maintained, all switching service may properly be separated into twelve general elements of service, as follows:

1. Classification Work.
2. Transfer Service.
3. Interchange Service.
4. Weighing Cars.
5. Icing Freight Cars.
6. Switching Coal Docks and Ash Pits.
7. Switching Shop, Repair and Stores Dep't Tracks.
8. Work for M. & W. Dept.
9. All Passenger Work.
10. Freighthouse Switching.
11. Team-track Switching.
12. Industrial Switching.

To ascertain the cost of a given kind of switching service (Industrial, Freighthouse, Team-track, etc.), in any terminal, it is necessary first, to determine the average cost per car for each of the foregoing elements of service, and second, to know what different elements of service are given to the cars under review; then add the costs of such [fol. 141] services, which result will be the total average costs per car for terminal switching.

On cars loaded in the terminal the elements considered should begin with the movement of the empty car after it is assigned to the traffic under review, and end with the classification movement into the outbound train, or with the interchange movement to a connecting line, while on the inbound loaded car the elements considered will begin with the classification movement in breaking up the inbound

train, or with the interchange movement if from a connecting line, and end with the assignment of the empty car to other service from the point of unloading, or with the return of the empty car to the classification yard where finally disposed of, or delivery to a connecting line. In intra-terminal switching the same relative elements will be considered.

When the services furnished to each car of a certain kind of traffic are the same in all cases, it will be necessary to consider the average cost only of the elements of service furnished, but, where different elements are furnished to some of the cars, it will be necessary to apply the individual elements of costs to each of the cars; thereby obtaining the total expense chargeable to the kind of traffic under review, which amount, divided by the total number of cars will produce the total average terminal switching cost per car.

When special service is regularly given to a particular kind of traffic the total cost of such special service should be used instead of the total average terminal switching cost per car.

As the cost per engine-hour in any one yard is constant, the output, measured in cars, divided into the average cost per engine-hour, will indicate the average cost per car for the kind of service under consideration.

The output per engine-hour for the various kinds of service can be determined only by a time study, made by yard conductors during a test period; for such study "Form C. S. 1," should be used. In analyzing these forms the time charged to "Transfer Services," where two or more breaking points are involved, will be apportioned on the [fol. 142] basis that the number of cars handled for each breaking point bears to the total cars handled, considering each transfer movement separately.

To determine the cost per engine-hour the expenses charged to the accounts enumerated herein will be apportioned on the bases prescribed, and in each case, unless otherwise specified, the proportion to be used at each terminal will be reduced to an engine-hour basis by dividing the amount obtained, by the total number of net engine-hours involved, during the test period, at such terminal.

By the term "Net Engine-hours" is meant the total number of hours on duty as reported on "Form C. S. 1," (which must balance with conductor's time slips for the test

period) less the overhead or non-productive time selected from the item of "Other Service" such as meal period, waiting for engine, having fire cleaned, taking coal and water, etc., but not including delays, as such time should be charged to the service being performed at the time delay occurs.

The time consumed in switching coal docks and ash pits as shown by element No. 6, "Form C. S. 1," should be apportioned between Yard and Road Service on the basis of fuel issues, and the yard proportion included with the yard over-head or non-productive time.

[fol. 143]

Section "A"—Continued

Engine Hour Costs

Account	Basis of Apportionment
M. of W. & S. Expenses	
202—Roadway Maintenance. 212—Ties. 214—Rails. 216—Other Track Material. 218—Ballast. 220—Track Laying and Surfacing.	If a record of the cost of repairs to each facility is maintained, ascertain the cost of repairs for one year, to all terminal side tracks which are maintained at the expense of the carrier in the terminal under review; reduce to the time covered by the test period and divide by the net engine-hours involved to secure the average cost per engine-hour. If a record of the cost of repairs to each facility is not maintained, ascertain the charges for one year to each of the following expense accounts: Nos. 202, 212, 214, 216, 218 and 220. (If maintenance accounts are kept by divisions, use the charges to the above accounts for the division on which the terminals under review are located.) To ascertain the cost per mile of expenses chargeable to the six accounts listed above, it will be necessary to equate the miles of main track and the miles of side track in the ratio of three (3) miles of side track to one (1) mile of main track, and divide the total expenses chargeable to these accounts for one year by this total equated mileage, thereby obtaining an average cost per equated mile of track, per annum, which amount divided by three will indicate the average cost per mile, per annum, of side tracks for these accounts. Multiply this cost per mile by the number of miles of terminal side tracks which are maintained at the expense of the carrier in the terminal under review; reduce to the time covered by the test period, and divide by the net engine-hours involved to obtain the average cost per engine-hour. If the expense charged to these accounts is separated in the carriers records between main and side track, only the expense assigned to side tracks will be considered.

Section "A"—Continued

Engine Hour Costs

Account	Basis of Apportionment
208—Bridges, Trestles and Culverts.	Ascertain the cost of repairs for one year, to each drawbridge (or other bridge of sufficient size to warrant) in the terminal under review; reduce to the time covered by the test period and apportion on basis of the number of times used by yard engines versus all other engines or trains, as reflected by a study on "Form C. S. 7," during the test period; divide the yard proportion by the net engine-hours involved to obtain the average cost per engine-hour.
227—Station and Office Buildings.	Ascertain the cost of repairs for one year, to the yard office buildings, etc., in the terminal under review; reduce to the time covered by the test period, and divide by the net engine-hours involved to obtain the average cost per engine-hour.
[fol. 144]	
231—Water Stations. 233—Fuel Stations.	Ascertain the cost of repairs for one year, to water and fuel stations in the terminal under review; reduce to the time covered by the test period, and apportion between yard and road service on the basis of fuel issues; divide the yard proportion by the net engine-hours involved to obtain the average cost per engine-hour.
235—Shops and Enginehouses.	Ascertain the cost of repairs for one year, to each enginehouse in the terminal under review; reduce to the time covered by the test period, and apportion between road and yard service, on the basis of the number of engines handled; divide the yard proportion by the net engine-hours involved, to obtain the average cost per engine-hour.
249—Signals and Interlockers.	Ascertain the cost of repairs for one year, to each interlocking plant in the terminal under review; to reduce to the time covered by the test period, and apportion on basis of the number of times used by yard engines versus all other engines or trains as reflected by a study on "Form C. S. 7," during the test period. Divide the yard proportion by the net engine-hours involved to obtain the average cost per engine-hour.
M. of W. & S. Expenses (Continued)	
201—Superintendence. 274—Injuries to Persons. 275—Insurance. 276—Stationery and Printing. 277—Other Expenses.	Determine the percentage proportion of M. of W. & S. expenses used, of the total M. of W. & S. expenses, exclusive of Accounts 201, 274, 275, 276 and 277, and apply this percent to the amount charged to accounts 201, 274, 275, 276 and 277 to obtain the proportion of those accounts chargeable to the terminal under review, and divide by the net engine-hours involved to obtain the average cost per engine-hour.

Section "A"—Continued

Engine Hour Costs

Account	Basis of Apportionment
[fol. 145] M. of E. Expenses	
308—Steam Locomotives—Repairs.	Ascertain the average cost per mile for a one year period (by classes of engines if available) and apply to the gross engine miles made in the terminal under review during the test period (based on six (6) miles per hour), and divide by the net engine-hours involved to obtain the average cost per engine-hour.
309—Steam Locomotives—Depreciation. 310—Steam Locomotives—Retirements.	Apportion on the basis prescribed for "Account 308—Steam Locomotives—Repairs."
301—Superintendence. 302—Shop Machinery. 332—Injuries to Persons. 333—Insurance. 334—Stationery and Printing. 335—Other Expenses.	Determine the percentage proportion of "Account 308—Steam Locomotives—Repairs" used, of the total M. of E. expenses, exclusive of Accounts 301, 302, 332, 333, 334 and 335, and apply this percent to the amount charged to Accounts 301, 302, 332, 333, 334 and 335 to obtain the proportion of those accounts chargeable to the terminal under review, and divide by the net engine-hours involved to obtain the average cost per engine-hour.

See Page 10 for "Car Detention—Cost per Car per Day."

Transportation Expenses	
377—Yardmasters and Clerks. 378—Yard Conductors and Brakemen. 379—Yard Switch and Signal Tenders. 380—Yard Enginemen.	Assign actual expenses during the test period in the terminal under review, and divide by the net engine hours involved to obtain the average cost per engine-hour.
382—Fuel for Yard Locomotives. 385—Water for Yard Locomotives. 386—Lubricants for Yard Locomotives. 387—Other Sup. for Yard Locomotives. 388—Enginehouse Expenses—Yard. 389—Yard Supplies and Expenses.	Assign direct, if available. Otherwise ascertain the average cost per mile for one year in yard service, apply to the gross engine miles made during the test period in the terminal under review (based on six (6) miles per hour), and divide by the net engine-hours involved to obtain the average cost per engine-hour.
404—Signal and Interlocker Operation. 405—Crossing Protection.	Apportion on basis of the number of times used by yard engines versus all other engines or trains as reflected by a study on "Form C. S. 7," during the test period, of each interlocking plant and protected crossing in the terminal under review, and divide the yard proportion by the net engine-hours involved to obtain the average cost per engine-hour.

Section "A"—Continued

Engine Hour Costs

Account	Basis of Apportionment
[fol. 146]	
406—Drawbridge Operation.	Apportion on basis of the number of times used by yard engines versus all other engines or trains, as reflected by a study on "Form C. S. 7," during the test period of each drawbridge in the terminal under review, and divide the yard proportion by the net engine-hours involved to obtain the average cost per engine-hour.
371—Superintendence. 410—Stationery and Printing. 411—Other Expenses. 414—Insurance.	Determine the percentage proportion of Transportation expenses used, of the total Transportation expenses, exclusive of Accounts 371, 410, 411 and 414, and apply this percent to the amount charged to Accounts 371, 410, 411 and 414 to obtain the proportion of those accounts chargeable to the terminal under review, and divide by the net engine-hours involved to obtain the average cost per engine-hour.
General Expenses	
451—Salaries and Expenses of General Officers. 452—Salaries and Expenses of Clerks and Attendants. 453—General Office Supplies and Expenses. 454—Law Expenses. 455—Insurance. 458—Stationery and Printing. 460—Other Expenses.	Apportion on the basis that the amount used, of M. of W. & S., M. of E., and Transportation accounts, bears to the total of all Operating Expense accounts, and divide by the net engine-hours involved to obtain the average cost per engine-huor.

The sum of these average costs per engine-hour, at stations to which "Section A" is applicable, will indicate the total average cost per engine-hour in the terminal under review for the accounts involved.

To obtain the average switching cost per car for any certain kind of traffic, it will be necessary to consider the average costs only of the elements of service actually furnished the traffic under review.

To obtain the cost of switching service per hundred pounds, it will be necessary to apply the average cost per car for the various elements of service actually furnished the cars under review, and divide by the tonnage involved.

[fol. 147] Car Detention—Cost per Car Day

Account	Basis of Apportionment
M. of W. Expenses	
314—Freight-train Cars—Repairs.	Ascertain the charges to this account for one year and divide by the serviceable car days for the one year period to determine the average age cost per car per day.
315—Freight-train Cars—Depreciation. 316—Freight-train Cars—Retirements.	Apportion on the basis prescribed for "Account 314—Freight-train Cars—Repairs."

Section "A"—Continued

Account	Basis of Apportionment
M. of W. Expenses—Continued	
301—Superintendence. 302—Shop Machinery. 332—Injuries to Persons. 333—Insurance. 334—Stationery and Printing. 335—Other Expenses.	Determine the percentage proportion of "Account 314—freight-train Cars—Repairs" used, of the total M. of E. expenses, exclusive of Accounts 301, 302, 332, 333, 334 and 335, and apply this percent to the amount charged to Accounts 301, 302, 332, 333, 334 and 335 to obtain the proportion of these accounts chargeable per car per day.
General Expenses	
451—Salary and Expenses of General Officers. 452—Salary and Expenses of Clerks and Attendants. 453—General Office Supplies and Expenses. 454—Law Expenses. 455—Insurance. 458—Stationery and Printing. 460—Other Expenses.	Apportion on the basis that the amount used, of the above M. of E. accounts, bears to the total of all Operating Expense accounts, to obtain the cost per car per day for these expenses.

The sum of the amounts determined by the above specifications will be the average cost per car per day for car detention. Apply this cost per car per day to the average number of days detention, or fractions thereof, made by the traffic under review in terminal service during the test period as per "Form C. S. 6," to obtain the cost for car detention. This average cost per car multiplied by the number of cars in the service under review and divided by the tonnage involved will indicate the cost per ton or per hundred pounds.

If the cost per car is desired, multiply the cost per car day by the average number of days detention, or fraction thereof.

[fol. 148]

Section "B"

Road Train Terminal Service

At stations where the switching and other terminal services are performed by road freight trains it is necessary to use a different basis for the allocation of expenses to the services and facilities under review and in such cases the following methods should be employed.

Account	Basis of Apportionment
M. of W. & S. Expenses	
202—Roadway Maintenance. 212—Ties. 214—Rails. 216—Other Track Material. 218—Ballast. 220—Track Laying and Surfacing.	If a record of the cost of repairs to each facility is maintained, ascertain the cost of repairs, for one year, to all terminal side tracks which are maintained at the expense of the carrier in the terminal under review; reduce to the time covered by the test period, and assign to the service under review on basis of loaded cars handled on terminal tracks. If a record of the costs of repairs to each facility is not maintained, ascertain the charges for one year to each of the following expense accounts: Nos. 202, 212, 214, 216, 218, and 220. (If maintenance accounts are kept by divisions, use the charges to the above accounts for the division on which the terminals under review are located.)

Section "B"—Continued

Road Train Terminal Costs

Account	Basis of Apportionment
M. of W. & S. Expenses—Continued	
	To ascertain the cost per mile of expenses chargeable to the six accounts listed above, it will be necessary to equate the miles of main track and the miles of side track in the ratio of three (3) miles of side track to one (1) miles of main track, and divide the total expenses chargeable to these accounts for one year by this total equated mileage, thereby obtaining an average cost per equated mile of track, per annum, which amount divided by three will indicate the average cost per mile, per annum, of side tracks for these accounts. Multiply the cost per mile by the miles of terminal side tracks which are maintained at the expense of the carrier in the terminal under review and reduce to the time covered by the test period. If the expense charged to these accounts is separated in the carriers records between main and side tracks, only the expense assigned to side tracks will be considered.
208—Bridges, Trestles and Culverts.	Ascertain the cost of repairs for one year to each drawbridge (or other bridge of sufficient size to warrant) in the terminal under review; reduce to the time covered by the test period, and apportion on the basis of the number of times used by local freight trains or switch runs versus all other trains, as reflected by a study on "Form C. S. 8," during the test period.
249—Signals and Interlockers.	Ascertain the cost of repairs for one year to each interlocking plant in the terminal under review; reduce to the time covered by the test period, and apportion on basis of the number of times used by local freight trains or switch runs versus all other trains, as reflected by a study on "Form C. S. 8," during the test period.

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201—Superintendence. 274—Injuries to Persons. 275—Insurance. 276—Stationery and Printing. 277—Other Expenses.	Determine the percentage proportion of M. of W. & S. expenses used, of the total M. of W. & S. expenses, exclusive of Accounts 201, 274, 275, 276 and 277, and apply this per cent to the amount charged to Accounts 201, 274, 275, 276 and 277 to obtain the proportion of those accounts chargeable to the terminal under review.

In a study of the cost of handling "L. C. L." freight at stations where the freight is handled direct to and from the cars in train, while the train occupies the main or passing tracks, the expense of track maintenance will be omitted.

Section "B"—Continued

Road Train Terminal Costs

Account	Basis of Apportionment
M. of E. Expenses	
308—Steam Locomotives—Repairs.	Ascertain the average cost per mile for one year for road freight train service (by classes of engines, if available) and apply this average cost to the length of the run serving the stations under review, so as to determine the cost of the trip. If train switching locomotive miles are reported on the trips under review, the length of the run should be increased to include the additional locomotive mileage. Apportion this expense to the stations involved on the basis that the time consumed in terminal service at each station under review bears to the total time of the trip, as per "Form C. S. 5."
309—Steam Locomotives—Depreciation. 310—Steam Locomotives—Retirements.	Apportion on the basis prescribed for "Account 308—Steam Locomotives—Repairs."
301—Superintendence. 302—Shop Machinery. 332—Injuries to Persons. 333—Insurance. 334—Stationery and Printing. 335—Other Expenses.	Determine the percentage proportion of "Account 308—Steam Locomotives—Repairs" used, of the total M. of E. expenses, inclusive of Accounts 301, 302, 332, 333, 334 and 335, and apply this per cent to the amount charged to Accounts 301, 302, 332, 333, 334 and 335 to obtain the proportion of those accounts chargeable to the terminal under review.

See Page 15 for "Car Detention—Cost per Car per Day."

[fol. 150]

Transportation Expenses	
394—Fuel for Train Locomotives. 397—Water for Train Locomotives. 398—Lubricants for Train Locomotives. 399—Other Sup. for Train Locomotives. 400—Enginehouse Expenses—Train. 402—Train Supplies and Expenses.	Ascertain the average cost per mile for one year for road freight train service and apply this average cost to the length of the run serving the stations under review, so as to determine the cost of the trip. If train switching locomotive miles are reported on the trips under review, the length of the run should be increased to include the additional locomotive mileage. Apportion this expense to the stations involved on the basis that the time consumed in terminal service at each station under review bears to the total time of the trip.
392—Train Enginemen. 401—Trainmen.	Ascertain the cost of each trip and apportion to the stations under review on the basis that the time consumed in terminal service at each station bears to the total time consumed in making the trip.
404—Signal and Interlocker Operation. 405—Crossing Protection.	Assign on the basis of the number of times used by local freight trains and switch runs versus the number of times used by all other trains as reflected by a study on "Form C. S. 8," during the test period, of each interlocking plant and protected crossing in the terminal under review.

[fol. 151] Section "B"—Continued

Road Train Terminal Costs

Account	Basis of Apportionment
Transportation Expenses—Continued	
406—Drawbridge Operation.	Apportion on basis of the number of times used by local freight trains or switch runs versus all other trains, as reflected by a study on "Form C. S. 8," during the test period, of each drawbridge in the terminal under review.
371—Superintendence. 410—Stationery and Printing. 411—Other Expenses. 414—Insurance.	Determine the percentage proportion of Transportation expenses used, of the total Transportation expenses, exclusive of Accounts 371, 410, 411 and 414, and apply this per cent to the amount charged to Accounts 371, 410, 411 and 414 to obtain the proportion of those accounts chargeable to the terminal under review.
[fol. 151]	
General Expenses	
451—Salaries and Expenses of General Officers. 452—Salaries and Expenses of Clerks and Attendants. 453—General Office Supplies and Expenses. 454—Law Expenses. 455—Insurance. 458—Stationery and Printing. 460—Other Expenses.	Apportion on the basis that the amount used, of M. of W. & S., M. of E., and Transportation accounts, bears to the total of all Operating Expense accounts.

Having assigned the terminal proportion of the various accounts, as specified under "Section B", to the stations under review, to which "Section B" is applicable, apportion between "C. L." and "L. C. L." service in the following manner:

At stations where the cars of "L. C. L." freight are set off or picked up as solid cars, divide the proportion of these expenses chargeable to the station under review, on the basis of the loaded cars handled on terminal tracks.

At stations where the train crews actually handle the "L. C. L." freight and perform switching service, divide these expenses on the basis of the time consumed in each kind of service.

When both kinds of service are performed simultaneously by members of the same crew, the time for each service should be properly equated and the costs apportioned accordingly.

Use "Form C. S. 5" to ascertain the percentage proportion that the time of road freight trains in terminal service, at each station under review, bears to the total time of the trip; also to apportion the time at such station between handling "L. C. L." freight and switching.

At stations where road freight trains or switch runs perform the switching service and it is desired to ascertain the cost of switching a particular kind of traffic, it will be necessary to convert the costs obtained by the application of "Section B" into a cost per engine-hour and after determining the output per hour by the application of "Form C. S. 1," thereby obtain the cost per element of service given to the traffic under review.

Section "B"—Concluded

Car Detention—Cost per Car Day

Account	Basis of Apportionment
M. of E. Expenses	
314—Freight-train Cars—Repairs.	Ascertain the charges to this account for one year and divide by the serviceable car days for the one year period, to determine the average cost per car per day.
315—Freight-train Cars—Depreciation. 316—Freight-train Cars—Retirements.	Apportion on the basis prescribed for "Account 314—Freight-train Cars—Repairs."

[fol. 152]

301—Superintendence. 302—Shop Machinery. 332—Injuries to Persons. 333—Insurance. 334—Stationery and Printing. 335—Other Expenses.	Determine the percentage proportion of "Account 314—Freight-train Cars—Repairs" used, of the total M. of E. expenses, exclusive of Accounts 301, 302, 332, 333, 334 and 335, and apply this per cent to the amount charged to Accounts 301, 302, 332, 333, 334 and 335 to obtain the proportion of these accounts chargeable per car per day.
General Expenses	
451—Salary and Expenses General Officers. 452—Salary and Expenses of Clerks and Attendants 453—General Office Supplies and Expenses. 454—Law Expenses. 455—Insurance. 458—Stationery and Printing. 460—Other Expenses.	Apportion on the basis that the amount used, of the above M. of E. accounts, bears to the total of all Operating Expense accounts, to obtain the cost per car per day for these expenses.

The sum of the amounts determined by the above specifications will be the average cost per car per day for car detention. Apply this cost per car per day to the average number of days detention, or fractions thereof, made by the traffic under review in terminal service during the test period as per "Form C. S. 6," to obtain the cost for car detention. This average cost per car multiplied by the number of cars in the service under review and divided by the tonnage involved will indicate the cost per ton or per hundred pounds.

If the cost per car is desired, multiply the cost per car day by the average number of days detention, or fraction thereof.

Optional Accounts

If the carrier making the cost investigation desire to include additional expenses, a list of accounts is appended, the use of which is entirely optional. When any of these "optional" accounts are used it is suggested that, wherever possible, the provisions of the formula covering the apportionment of accounts of an analogous nature, be followed.

In case any of these "optional" accounts are included, the result must be set up separately, so as not to conflict with the making of a composite statement of the results on two or more lines using the formula as outlined, in the preceding pages.

Optional Accounts—Continued

Account	Basis of Apportionment
M. of W. & S.	
203—Roadway—Depreciation.	
204—Underground Power Tubes.	
205—Underground Power Tubes—Depreciation.	
206—Tunnels and Subways.	
207—Tunnels and Subways—Depreciation.	
209—Bridges, Trestles and Culverts—Depreciation.	
[fol. 153]	
210—Elevated Structures.	
211—Elevated Structures—Depreciation.	
213—Ties—Depreciation.	
215—Rails—Depreciation.	
217—Other Track Material—Depreciation.	
219—Ballast—Depreciation.	
221—Right-of-way Fences.	
222—Right-of-way Fences—Depreciation.	
223—Snow and Sand Fences and Snow Sheds.	
224—Snow and San Fences and Snow Sheds—Depreciation.	
225—Crossings and Signs.	
226—Crossings and Signs—Depreciation.	
228—Station and Office Buildings—Depreciation.	Assign direct and apportion on basis of appropriate units.
229—Roadway Buildings.	
230—Roadway Buildings—Depreciation.	
232—Water Stations—Depreciation.	
234—Fuel Stations—Depreciation.	
236—Shops and Enginehouses—Depreciation.	
241—Wharves and Docks.	
242—Wharves and Docks—Depreciation.	
243—Coal and Ore Wharves.	
244—Coal and Ore Wharves—Depreciation.	
245—Gas Producing Plants.	
246—Gas Producing Plants—Depreciation.	
247—Telegraph and Telephone Lines.	
248—Telegraph and Telephone Lines—Depreciation.	
250—Signals and Interlockers—Depreciation.	
251—Power Plants, Dams, Canals, and Pipe Lines.	
252—Power Plants, Dams, Canals, and Pipe Lines—Depreciation.	

[fol. 154] Optional Accounts—Continued

Account	Basis of Apportionment
M. of W. & S. (Continued)	
253—Power Plant Buildings.	
254—Power Plant Buildings—Depreciation.	
255—Power Sub-Station Buildings.	
256—Power Sub-Station Buildings—Depreciation.	
257—Power Transmission Systems.	
258—Power Transmission Systems—Depreciation.	
259—Power Distribution Systems.	
260—Power Distribution System—Depreciation.	
261—Power Line Poles and Fixtures.	
262—Power Line Pole and Fixtures—Depreciation.	Assign direct and apportion on basis of appropriate units.
263—Underground Conduits.	
264—Underground Conduits—Depreciation.	
265—Miscellaneous Structures.	
266—Miscellaneous Structures—Depreciation.	
267—Paving.	
268—Paving—Depreciation.	
269—Roadway Machines.	
270—Roadway Machines—Depreciation.	
271—Small Tools and Supplies.	
272—Removing Snow, Ice, and Sand.	
273—Assessments for Public Improvements.	
M. of E.	
303—Shop Machinery—Depreciation.	
304—Power Plant Machinery.	
305—Power Plant Machinery—Depreciation.	
306—Power Sub-Station Apparatus.	
307—Power Sub-Station Apparatus—Depreciation.	
311—Other Locomotives—Repairs.	
312—Other Locomotives—Depreciation.	
313—Other Locomotives—Retirements.	
320—Motor Equipment of Cars—Repairs.	Assign direct and apportion on basis of appropriate units.
321—Motor Equipment of Cars—Depreciation.	
322—Motor Equipment of Cars—Retirements.	

[fol. 155] Optional Accounts—Concluded

Account	Basis of Apportionment
M. of E.—Continued	
323—Floating Equipment—Repairs.	
324—Floating Equipment—Depreciation.	
325—Floating Equipment—Retirements.	
326—Work Equipment—Repairs.	
327—Work Equipment—Depreciation.	Apportion on basis prescribed for "Account 201—Superintendence."
328—Work Equipment—Retirements.	
329—Miscellaneous Equipment—Repairs.	
330—Miscellaneous Equipment—Depreciation.	Assign direct and apportion on basis of appropriate units.
331—Miscellaneous Equipment—Retirements.	
Transportation Expenses	
372—Dispatching Trains.	
374—Weighing, Inspection, and Demurrage Bureaus.	
375—Coal and Ore Wharves.	
381—Yard Motormen.	
383—Yard Switching Power Produced.	
384—Yard Switching Power Purchased.	Assign direct and apportion on basis of appropriate units.
393—Train Motormen.	
395—Train Power Produced.	
396—Train Power Purchased.	
407—Telegraph and Telephone Operation.	
408—Operating Floating Equipment.	
415—Clearing Wrecks.	
416—Damage to Property.	
Transportation—Water Lines	
431—Operation of Vessels.	
432—Operation of Terminals.	Assign direct and apportion on basis of appropriate units.
433—Incidentals.	
General Expenses	
456—Relief Department Expenses.	
457—Pensions.	Apportion on basis prescribed for "Accounts 451–452–453–454–455–458 and 460."
459—Valuation Expenses.	

[fol. 156] Data Required for Application of Formula

Unit Number	Description
1.	Consignments handled by freight office forces.
2.	Engine-hours in each yard under review.
3.	Fuel issues at fuel stations in terminal under review.
4.	Loaded cars handled on terminal tracks.
5.	Locomotives handled at individual engine-houses in terminal under review.

Data Required for Application of Formula

Unit Number	Description
6.	Miles of main track on division or system.
7.	Miles of side-tracks on division or system maintained at the expense of the carrier.
8.	Miles of side-tracks in terminal under review maintained at the expense of the carrier.
9.	Number of times protected street crossing is used by yard engines versus all other engines or trains.
10.	Number of times interlocker tower is used by yard engines versus all other engines or trains.
11.	Number of times protected street crossing is used by local freight trains or switch runs versus all other trains.
12.	Number of times interlocker tower is used by local freight trains or switch runs versus all other trains.
13.	Number of times drawbridge is used by all yard engines versus all other engines or trains.
14.	Number of times drawbridge is used by local freight trains or switch runs versus all other trains.
15.	Pounds of terminal "L. C. L." freight handled at station under review:
16.	Pounds of through "L. C. L." freight handled at station under review.
17.	Terminal time of freight trains at station under review.
18.	Terminal detention to cars in traffic under review.
19.	Terminal movements of cars in traffic under review.

The data required for the application of the formula should cover the time of test period.

[fol. 157] Provision for Return on Property Investment, etc.

After having obtained the terminal costs of handling the traffic under review, some provision should be made to provide for the fixed charges and allow a fair return upon the investment in order that each type of traffic may bear its proportionate share.

It is suggested that to the unit costs, as obtained by the application of this formula, there be applied an operating ratio of 66.27 percent or such ratio as will produce rates sufficiently remunerative to provide for adequate funds to care for taxes, interest on bonded indebtedness, etc., and a fair return upon the investment.

For example, if the unit terminal costs of a particular traffic is $3.50 per car in switch service an operating ratio of 66.67% is applied, the cost of $3.50 per car represents 66.67% of what the charge per car should be to provide for fixed charges, etc., therefore, $3.50 ÷ .6667 = $5.25 per car, which will be the proper charge per car for this service.

(Here follow 3 photos, folios 158-160)

158

Form CS-1

R. R.

COST STUDY—YARD CONDUCTOR'S WORK REPORT.

Yard ..... Eng. No. ..... Date ..... 19....

...y ..... M Off Duty ..... M No. of Brakemen ..... Conductor .....

...CATION— ...g and break- ...reight trains ...de.	Time From	Time To	Cars classified Loads	Cars classified Empties
	M	M		
	M	M		
	M	M		
	M	M		
	M	M		
	M	M		

...ER SERVICE—Handling cars from one yard or industry to another ...r industry. (USE OTHER SIDE)

...NG CARS TO ...FROM CON- ...DUS ...s of road	Time From	Time To	Cars interchanged Loads	Cars interchanged Empties
	M	M		
	M	M		
	M	M		
	M	M		
	M	M		
	M	M		
	M	M		

	Time From	Time To	Cars weighed Loads	Cars weighed Empties
4 WEIGHING CARS (Name where weighed)	M	M		
	M	M		
	M	M		

	Time From	Time To	Cars load Loads	Cars load Empties
5 IDLE FREIGHT CARS	M	M		
	M	M		
	M	M		

	Time From	Time To
6 SWITCHING COMPANY COAL DOCKS AND ASH PITS	M	M
	M	M
7 SWITCHING SHOP, REPAIR AND STORES DEPARTMENT TRACKS	M	M
	M	M
8 WORK FOR MAINTENANCE OF WAY DEPARTMENT	M	M
	M	M
9 ALL PASSENGER WORK	M	M
	M	M
	M	M

	Name of freight house, team track or industry	Time From	Time To	CARS HANDLED To Loads	To Empties	From Loads	From Empties	Intra-plant (Note H.) Loads	Intra-plant (Note H.) Empties
...HT ...E ...CHING		M	M						
		M	M						
		M	M						
...TRACK ...CHING		M	M						
		M	M						
		M	M						
...STRIAL ...CHING ...cludes priv- ... industries, ..., wharves, ...ers, and d ...yards.)		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						
		M	M						

(The working card for this Form to be printed on tag board.)

2 TRANSFER SERVICE
(See note F.)

FROM (Show name of yard or industry)	Time	TO (Show name of yard or industry)	Time	Cars Handled	
				Loads	Empties
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		
	M		M		

OTHER SERVICE
(See note G.)

DESCRIPTION	From	To	DESCRIPTION	From	To
	M	M		M	M
	M	M		M	M
	M	M		M	M
	M	M		M	M
	M	M		M	M
	M	M		M	M
	M	M		M	M
	M	M		M	M

INSTRUCTIONS.

A.—This report is to be made by each yard conductor daily, at the time the work is performed during the test period.

B.—The information secured by this report is to be used to determine the cost of performing the various classes of switching service.

C.—Conductors should be very particular to show the correct time consumed in each class of service, and the actual number of cars to which services are rendered as called for under the various headings.

D.—All the time of the shift must be accounted for under one of the 12 sections, or as "Other Service".

E.—After crew has been assigned to some particular work and is delayed, such delay should be charged to the service to be performed.

F.—Transfer service should include the handling of cars direct from one yard to another yard; also movements between yard and industrial districts, and from one industry to another industry, when the distance is sufficient to warrant.

Movements of a "light" engine should be shown as transfer service and in the "Cars handled" column the word "light" should be shown.

G.—If any class of service is performed other than those numbered 1 to 12 inclusive, the time of such service should be shown under "Other Service," such as—

Time from time on duty until first service begins.

Time from close of last service until relieved from duty.

Waiting for engine, having fire cleaned, taking coal or water, lunch hour, pusher or helper service, helping trains into or out of yard, etc. When yard engine is used to help a road train or assist another yard engine, conductor must show time so consumed and show number of train or engine helped.

H.—Intra-plant switching as shown in Items 10, 11 and 12 should only include switching of cars from one location at a team track or industry to another location at the same team track or industry when handled on a "revenue switch order;" also between inbound and outbound freight houses at the same location.

Name

Day of Month	
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
29	
30	
31	
Total	
Per Cent Average	

Form C S 2.

R. R.

COST STUDY—TIME STUDY OF STATION EMPLOYES.

Station. Month of 19

Title Monthly Wages, $

1	2	FREIGHT		5	6	7	8	9	10	11	12	13	14
Passenger	Handling U. S. Mail	3 Office Work	4 Warehouse Work	Yard Clerks (Train Yards Only.)	Telegraphing (Handling Trains.)	Telegraphing (Western Union)	Telegraphing (Freight Station)	Telegraphing (Yard Office)	Crossing Flagmen and Gatemen	Leverman	Switch Lights	Signals	Total
Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min	Hrs Min

[fol. 161] Instructions

A. During the test period a separate report on this form must be made to cover the service of each employe at all stations where two or more classes of service are performed. Exclusive freight stations will use "Form C S-3" instead of this blank.

B. It is desired to obtain an exact distribution of the time of each employe as between the different classes of service indicated by the headings on the face of this blank. Time to be shown in hours and minutes. It is very important that the distribution between the various classes of service be correct, and must be based on the actual time consumed in each class of work. Employes engaged in only one class of service should have their full time charged to that class.

C. Agents will have this blank compiled daily by each employe shown on their pay-rolls (service or time reports), so that the total wages paid each employe, as shown on face of this blank, will balance the pay-rolls for the same month. At joint agency stations the time study should be made by all employes on agent's pay-roll, based on the time consumed in the various classes of service for all lines interested in joint agency. Show what line pays salaries and amount; if paid in part by each line so state.

D. Overtime for which an employe receives additional pay, must be charged to the class of service to which the overtime was devoted, charging a sufficient number of hours to equal the additional amount of pay. Example: If an employe puts in one hour over-time waiting on a passenger train and receives pay at the rate of time and one-half, there will be charged in Column 1, one and one-half hours time to equal such overtime.

E. Porter and janitor service should be divided between passenger, freight office, warehouse, etc., on basis of the time consumed doing such work for each of the classes of service.

F. Agent will show on the face of each blank, whether or not employe is required to work on Sundays; also state the number of days of annual vacation (if any) allowed with full pay.

[fol. 162] Column 1. Include in this column all time devoted to solicitation of passenger business, selling tickets, checking and handling baggage, and all work in connection therewith. Thirty minutes time should be charged for each passenger train, for which ticket window is kept open to serve, providing no other class of work is performed during that thirty minutes period. If other work, except passenger work, is performed, employe will deduct the amount of time consumed in other service and only charge to passenger work the balance of the thirty minute period. When ticket windows are kept open for passenger trains less than thirty minutes apart or trains running behind time, the total time windows are kept open will be reported and not thirty minutes for each train, first deducting the amount of time consumed in other service performed in such period.

Column 2. Include in this column all time devoted to U. S. mail work, including the handling to and from post-office and in loading and unloading from trains.

Column 3. Include in this column all time devoted to office work in connection with the handling of freight business, including solicitation, etc., but excluding clerical work performed in warehouse foreman's office.

Column 4. Include in this column all time devoted to labor of checking and handling of "L. C. L." freight and all work in the warehouse and on platform and team tracks in connection therewith.

Column 5. Include in this column only the time of yard clerks at points where regular yard switch engines are maintained. Time of employees doing yard clerk work at points where yard engines are not employed should be charged in column 3.

Column 6. Include in this column all time devoted to telegraphing, in connection with the handling of trains. Time of employe doing telegraphing for account of Passenger or Freight business, should be charged in Columns 1 or 3 respectively. Agents and operators handling levers for train operation will charge such time in Column 9.

Column 7. Include in this column all time devoted to handling Western Union business.

[fol. 163] Column 8. Include in this column all time devoted to telegraphing of local freight agent or his force.

Column 9. Include in this column all time devoted to telegraphing of yard masters or their force.

Column 10. Include in this column all time performing duties of crossing flagman and gateman.

Column 11. Include in this column all time devoted to handling levers in interlocking plants.

Column 12. Include in this column all time devoted to lighting and attending to switch lights.

Column 13. Include in this column all time devoted to the handling of express business and all work in connection therewith.

Column 14. The total of the first thirteen columns should balance the total of this column.

Agents will leave blank the spaces provided for percents and amount.

(Here follow 3 photos, folios 164-166)

164

Form C 53.

_____ R. R.

COST STUDY—DISTRIBUTION OF STATION PAY ROLL.

Station_____ Month of_____ 19____

CLASSIFICATION	Amount Chargeable to Each Class of Service	LEAVE THESE COLUMNS BLANK.		
		Per Cent.	OVERHEAD	TOTAL
ssenger				
R. Mail				
ight—Office Work				
Freight—Warehouse Work				
Freight—Receiving and Delivery Clerks				
rd Clerk Work—(Train Yards Only)				
legraphing—(Handling Trains)				
legraphing—(Western Union)				
legraphing (Freight Office)				
legraphing (Yard Office)				
ossing Flagman and Gateman				
oreman				
tanding Switch Lights				
gress				
emurrage Clerks				
oal Car Record Clerks				
Sub.-Total,		100 00		
reight Agent (Supervising only)				
Total,				

_____ Agent.

INSTRUCTIONS.

Agents at exclusive freight stations will use this blank to distribute the pay-roll expenses of their station, for the test period, as between the different classes of services indicated, taking into consideration whether or not Sunday work is required in computing the rate of pay for each employe; also increasing the amount earned by each employe involved by the proper proportion of the amount paid on account of the annual vacation allowance.

If any other classes of service are performed they should be shown on the blank lines.

At joint agency stations this report should be compiled to cover the pay-roll expense for all lines interested for the test period, if the entire expense is carried on the pay-rolls of either line; otherwise it should cover the pay-roll expense of the test line only, giving in all cases proper consideration to Sunday services and annual vacation allowances.

Station...

Number of	Termi	Covered by Billing Table into Station Category	1

1120

R. R. Form C 3 L

COST STUDY-REPORT OF CARS, CONSIGNMENTS AND TONNAGE.

tion Month of 19

Number of Pounds of L. C. L. Freight Handled by Platform Force.			Number of Consignments Handled by Office Force.			Number of Loaded Cars Handled on Terminal Track.		
Terminal Tonnage		Through Tonnage Transferred Going Beyond	C. L.	L. C. L.		C. L.	L. C. L.	
ed by Taken tation	From or To Connecting Line on Thru Billing			Freight HANDLED by Platform Force	Freight NOT HANDLED by Platform Force		Freight HANDLED by Platform Force	Freight NOT HANDLED by Platform Force
1	2	3	4	5	6	7	8	9

[fol. 167] Instructions

A. Agents will compile this report daily during the test period.

B. At joint agency stations the agent will report only the business of the road conducting the cost study.

C. Agents handling the billing for "Prepay" or "Non-Agency" stations will make a separate report covering only the number of consignments from and to such station.

D. Agents will include in this report freight for account of Company use.

E. By terminal tonnage is meant tonnage originating at and destined to the station, including freight received from and delivered to connecting lines at that station.

F. By the number of consignments is meant the number of shipments as per number of shipping orders, connecting line slips, and the number of expense bills (regardless of the number of articles included in one shipment), and not based upon the number of way-bills in and out, as a way-bill may cover two or more consignments; also count each switching order as a consignment. Agents at Junction points will not include as consignments shipments covered by through billing received from and delivered to connecting lines at their station even though expense bills are made for receipt purposes.

G. By terminal tracks is meant all tracks used for the handling of business pertaining to the station, including intercharge tracks with connecting lines.

Column 1. Include in this column the pounds of freight handled by platform force, when such freight is billed or accounted for by station office force. This will include freight received from and delivered to connecting lines on transfer slips, as the charges on such freight must be accounted for by office force.

Column 2. Include in this column the pounds of freight handled by platform force when such freight is covered by through billing received from or delivered to connecting line.

Column 3. Include in this column the number of pounds of less than carload freight transferred going beyond [fol. 168] "transfer point" over carrier's own rails; also freight interchanged between two or more divisions or branches of this railroad. When it is necessary to handle a shipment more than once to complete a transfer from car to car, the weight will be counted each time shipment is handled.

When loaded cars are transferred by platform forces, on account of bad order, load shifting, etc., the tonnage should be reported in this column.

Column 4. Include in this column the number of consignments covering carload freight. (If carload freight is handled by platform force, such consignments should be included in Column 5).

Column 5. Include in this column the number of consignments covering freight actually handled by platform force, either over platform or on team tracks.

Column 6. Include in this column the number of consignments covering "L. C. L." freight not handled by platform force.

Column 7. Include in this column all cars of carload freight received and forwarded. This will include loaded cars received from and delivered to connecting lines; also all loaded cars switched from one industry to another industry on the tracks of this company and between industries and tracks of connecting lines.

Column 8. Include in this column all loaded cars received and forwarded which freight is actually handled by platform force, over platform or from and to cars on team tracks. (This will include cars of freight received from and delivered to connecting lines which freight is handled by platform force.)

Column 9. Include in this column all cars of "L. C. L." freight received and forwarded which freight is not handled by platform force.

(Here follows 1 photo, folios 169 & 170.)

169-170

R. R.

Form C S 5.

COST STUDY—TRAIN DETENTION REPORT.

...le. Engine No. Date 19...

... to No. of Brakemen

...d Released Total time

...y M. from duty M. on duty Hrs. Min.

1 ...tion	2 Arrived	3 Departed	4 Total Time of Stop		DETAIL OF TOTAL TIME OF STOP							
					Time of Stop Account Station Freight Service						7 Time of Stop Account all other Causes	
					5 Loading and Unloading Freight			6 Station Switching				
			Hrs.	Mins.	No. of Men	Hrs.	Mins.	No. of Men	Hrs.	Mins.	Hrs.	Mins.
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										
	M.	M.										

Conductor.

[fols. 171 & 172] Instructions

A. This report is to cover the time consumed at selected local stations by freight and mixed trains, separated as between station service and all other causes.

B. Show in Column 5 the total time consumed in loading and unloading "L. C. L." freight, indicating the number of members of the crew used for that service.

C. Show in Column 6 the total time consumed in switching cars picked up or set off, which originate at or are destined to that station, or cars received from or delivered to connecting lines at that station, and doing other station switching, indicating the number of members of the crew used for that service.

D. Use as many lines for each station as are necessary to show the number of members of crew and actual time involved in each of the above services.

E. Show in Column 7 the time consumed for all other causes, such as delays by other trains, taking coal and water, reducing or increasing tonnage, switching cars not originating at or destined to the station, etc.

F. Where one or more members of the crew are used to protect their train against other trains, during the performance of station work, such time should be distributed to the various kinds of service performed.

(Here follows 1 photo, folios 173 & 174.)

173-174

116A

Form CS-4

_____ R. R.

COST STUDY—CAR DETENTION REPORT.

tion_____ Kind of service_____ From_____ 19__ to_____ 19___

wn_____ To_____

(Show name of Yard, Connection or Industry.) (Show name of Yard, Connection or Industry.)

Initial	Number	Terminal detention begins		Terminal detention ends		Total detention		Lading	Weight
		Date	Time	Date	Time	Hours	Minutes		

_____ Agent.

[fols. 175 & 176] Instructions

This report is to cover all cars in the service under review during the test period.

Terminal detention begins when cars are assigned for loading, received in road freight trains (if inbound loaded move is considered), or when received from connecting lines in switch or road service.

Terminal detention ends when cars are released from lading, when switched into trains for road movement, or when delivered to connecting lines.

Cars in switch movement between connecting lines and industries on tracks of carrier making study should be charged with the entire time cars are on rails of the interested carrier provided they are not used in any other service.

Include trap or ferry cars if "L. C. L." service is under review.

177

†Form CS-7.

.....R. R.

COST STUDY—REPORT OF INTERLOCKER TOWER, DRAWBRIDGE OR STREET CROSSING OPERATION.

.....Station. Period.....19...

Name of Tower or street crossing..... Do you work Sundays.....

Salary per month..... Name.....

DATE	NUMBER OF TIMES PLANT DRAWBRIDGE OR STREET CROSSING IS USED BY YARD SWITCH ENGINES OR YARD CUTS.

DATE	NUMBER OF TIMES PLANT DRAWBRIDGE OR STREET CROSSING IS USED BY ALL OTHER ENGINES OR TRAINS (FREIGHT, PASSENGER, ETC.)

MAKE TALLY MARK EACH TIME TOWER, BRIDGE OR STREET CROSSING IS USED.

(The working card for this Form to be printed on tag-board.)

Form C8-4.

.....R. R.

COST STUDY—REPORT OF INTERLOCKER TOWER, DRAWBRIDGE OR STREET CROSSING OPERATION

Name of Tower or street crossing.....Station. Period.....19...

Salary per month..... Name..... Do you work Sundays.....

DATE	NUMBER OF TIMES PLANT DRAWBRIDGE OR STREET CROSSING IS USED BY LOCAL FREIGHT TRAINS OR SWITCH RUNS.

DATE	NUMBER OF TIMES PLANT DRAWBRIDGE OR STREET CROSSING IS USED BY ALL OTHER ENGINES OR TRAINS (FREIGHT, PASSENGER, ETC.)

MAKE TALLY MARK EACH TIME TOWER, BRIDGE OR STREET CROSSING IS USED.

(The working card for this form to be printed on tag board.)

179

Form CS-A.

Exhibit No.

Witness

R. R.

TERMINAL COST STUDY.

Statement of Platform Costs.

Station From 19 To 19

Account No.	DESCRIPTION	Expense for Test Period	Pounds of Terminal Tonnage	Cost per Hundred Pounds
	MAINTENANCE OF WAY AND STRUCTURES.			
201	Superintendence			
207	Station and Office Buildings			
274	Injuries to Persons			
275	Insurance			
276	Stationery and Printing			
277	Other Expenses			
	Total			
	TRANSPORTATION.			
371	Superintendence			
373	Station Employees			
376	Station Supplies and Expenses			
410	Stationery and Printing			
411	Other Expenses			
414	Insurance			
	Total			
	GENERAL.			
451	Salaries and Expenses of General Officers			
452	Salaries and Expenses of Clerks and Attendants			
453	General Office Supplies and Expenses			
454	Law Expenses			
455	Insurance			
456	Stationery and Printing			
460	Other Expenses			
	Total			
	GRAND TOTAL			

180

Form 2a

.....Exhibit No.....

Witness .....

.....R. R.

TERMINAL COST STUDY

Statement of.....Clerical Costs.
(Carload or Less Carload.)

Station ..... From.....19... To.....19...

Account No.	DESCRIPTION	Expense for Test Period	Number of Consignments	Cost Per Consignment
	MAINTENANCE OF WAY AND STRUCTURES.			
261	Superintendence			
267	Station and Office Buildings			
274	Injuries to Persons			
276	Insurance			
276	Stationery and Printing			
277	Other Expenses			
	Total			
	TRANSPORTATION.			
271	Superintendence			
272	Station Employees			
276	Station Supplies and Expenses			
410	Stationery and Printing			
411	Other Expenses			
414	Insurance			
	Total			
	GENERAL.			
451	Salaries and Expenses of General Officers			
452	Salaries and Expenses of Clerks and Attendants			
453	General Office Supplies and Expenses			
454	Law Expenses			
455	Insurance			
456	Stationery and Printing			
459	Other Expenses			
	Total			
	GRAND TOTAL			

123

Form Ch-C 1.

.....Exhibit No.....

Witness.....

.....R. R.

TERMINAL COST STUDY

Statement of Engine Hour Costs

Station..... From.....19... To.....19...

Account No.	DESCRIPTION	Expense for Test Period	Engine Hours	Cost Per Engine Hour
	MAINTENANCE OF WAY AND STRUCTURES			
201	Superintendence			
202	Roadway Maintenance			
205	Bridges, Trestles and Culverts			
212	Ties			
214	Rails			
215	Other Track Material			
218	Ballast			
219	Track Laying and Surfacing			
227	Stations and Office Buildings			
231	Water Stations			
233	Fuel Stations			
239	Shops and Engine Houses			
249	Signals and Interlockers			
276	Injuries to Persons			
275	Insurance			
279	Stationery and Printing			
277	Other Expenses			
	.....			
	Total			
	MAINTENANCE OF EQUIPMENT			
301	Superintendence			
302	Shop Machinery			
306	Steam Locomotives—Repairs			
309	" " —Depreciation			
310	" " —Retirements			
326	Injuries to Persons			
323	Insurance			
324	Stationery and Printing			
326	Other Expenses			
	.....			
	.....			
	Total			

Form CS-C 2.

Exhibit No.

Witness

R. R.

TERMINAL COST STUDY

Statement of Engine Hour Costs

Station From 19 To 19

Account No.	DESCRIPTION	Expense for Test Period	Engine Hours	Cost Per Engine Hour
	TRANSPORTATION			
371	Superintendence			
377	Yardmasters and Yard Clerks			
378	Yard Conductors and Brakemen			
379	Yard Switch and Signal Tenders			
380	Yard Enginemen			
382	Fuel for Yard Locomotives			
385	Water for Yard Locomotives			
386	Lubricants for Yard Locomotives			
387	Other Supplies for Yard Locomotives			
388	Enginehouse Expenses—Yard			
389	Yard Supplies and Expenses			
404	Signal and Interlocker Operation			
406	Crossing Protection			
406	Drawbridge Operation			
410	Stationery and Printing			
411	Other Expenses			
414	Insurance			
	Total			
	GENERAL			
451	Salaries and Expenses of General Officers			
452	Salaries and Expenses of Clerks and Attendants			
453	General Office Supplies and Expenses			
454	Law Expenses			
455	Insurance			
456	Stationery and Printing			
460	Other Expenses			
	Total			
	SUMMARY			
	M. of W. & S.			
	M. of E.			
	Transportation			
	General			
	GRAND TOTAL			

When this form is used for engine hour cost under "Section B" of formula, substitute the respective train accounts for the yard accounts in the "Transportation Group."

Form CS-D

Exhibit No.

Witness

R. R.

TERMINAL COST STUDY

Statement showing Output per Engine Hour (Measured in Cars) and Cost per Car for the Various Elements of Switching Service.

Station From 19 To 19

No.	Description of Service.		No. Cars Handled Per Hour.	Cost Per Engine Hour	Cost Per Car
1	Classification—	(a)			
		(b)			
		(c)			
		(d)			
2	Transfers—	(a)			
		(b)			
		(c)			
		(d)			
		(e)			
		(f)			
		(g)			
		(h)			
		(i)			
		(j)			
3	Interchange—	(a)			
		(b)			
		(c)			
		(d)			
4	Weighing Cars—	(a)			
		(b)			
		(c)			
5	Icing Cars—	(a)			
		(b)			
		(c)			
10	Freight House—	(a)			
		(b)			
		(c)			
11	Team Track—	(a)			
		(b)			
		(c)			
		(d)			
12	Industrial—	(a)			
		(b)			
		(c)			
		(d)			
		(e)			
		(f)			
		(g)			
		(h)			
		(i)			
		(j)			
		(k)			
		(l)			
		(m)			
		(n)			
		(o)			

(If desired, numbers may be substituted for letters in listing elements.)

Form CS-C

Exhibit No.

Witness

R. R.

TERMINAL COST STUDY

Summary of Costs per Element to Determine Switching Costs per Car.

Traffic under review

Station From 19 To 19

Item No.	MOVEMENT OF TRAFFIC		Elements of Switching Service Performed	Cost per Car	No. of Cars	Total Costs
	FROM Yard—connecting line or Industry	TO Yard—connecting line or Industry				
	Total					
	Average per Car					

185

Form CS-F.

.....Exhibit No.....

Witness.....

.....R. R.

TERMINAL COST STUDY

Statement Showing Cost per Car per Day for Freight Train Car Repairs, Depreciation and Retirements, Average Detention and Cost per Car for these Items of Expense.

tion..... From.....19.... To.....19.....

ount No.	DESCRIPTION	Cost per day (Cents).
314	Freight Train Cars - Repairs	
315	" " " - Depreciation	
316	" " " - Retirements	
	Proportion of Maintenance of Equipment and General Overhead Expenses per car per day.	
	TOTAL	

	DESCRIPTION OF SERVICE		Cost per Day (Cents)	Average No. days cars in service	Cost per Car	No. of Cars	Total Costs
	FROM	TO					
	Total						
	Average per Car						

28

Form CS-G

.....Exhibit No.....

Witness.....

.....R R.

TERMINAL COST STUDY

Statement showing Summary of Costs per Car of.....at

.....Station. From.....19.... To.....19...

Item No.	MOVEMENT OF TRAFFIC		Description of Expense	Cost per Car	No. of Cars	Total Costs
	FROM	TO				

187

Form CS-H.

.....Exhibit No.....

Witness.....

.....R. R.

TERMINAL COST STUDY.

Statement showing Cost per Ton of Handling.....

At.....Station.

Station	No. of Cars	Tonnage	Average Tons Per Car	Clerical Cost		Car Detention Cost		Switching Cost		Total Cost		
				Amount	Per Car	Amount	Per Car	Amount	Per Car	Amount	Average per Car	Average per Ton (Cents)
Total												
Application of Operating Ratio of ..... Percent												

(Stations should be separated between originating and destination stations.)

Form CS-1

.....Exhibit No.....

Witness.....

.....R. R.

TERMINAL COST STUDY.

Statement showing Costs per One Hundred Pounds at.....

Stations, during period from.....19..., to.....19...

Station	Pounds of City L. C. L. Freight Handled	Platform Costs		Clerical Costs		Switching and Other Costs		Total Cost	
		Amount	Per Cwt.	Amount	Per Cwt.	Amount	Per Cwt.	Amount	Per Cwt. (Cents)
Total									
Application of Operating Ratio of.....Percent									

(Stations should be separated between originating and destination stations.)

[fol. 189]

DEFENDANT'S EXHIBIT 13

Pennsylvania Railroad System
Ill. Com. Com. Docket 12765

Statement Showing Detail of Engine Hour Cost, at Chicago, Ill., P. C. C. & St. L. R. R.

Total net engine hours.....1364

Account Number	Description of Account	Total Cost	Cost Per Hour
	Maintenance of Way & Structures:		
202	Roadway maintenance		
212	Ties		
214	Rails		
216	Other Track Material	$2834.57	$2.08
218	Ballast		
220	Track laying and surfacing		
201	Superintendence		
274	Injuries to Persons		
275	Insurance	408.14	.30
276	Stationery and Printing		
277	Other expenses		
	Total M. of W. & S.	$3242.71	$2.38
	Maintenance of Equipment:		
308	Steam Locomotive—Repairs	3272.99	2.40
309	Steam Locomotives—Depreciation		
310	Steam Locomotives—Retirements	162.38	.12
301	Superintendence		
302	Shop Machinery		
332	Injuries to Persons		
333	Insurance	579.17	.42
334	Stationery and Printing		
335	Other expenses		
	Total M. of E.	$4014.54	$2.94
	Transportation Expenses:		
377	Yard Masters and Clerks	$520.00	$ .38
379	Yard Switch and Signal Tenders	663.17	.48
378	Yard Conductors and Brakemen	3828.24	2.69
380	Yard Enginemen	2265.93	1.79
382	Fuel for Yard Locomotives		
385	Water for Yard Locomotives		
386	Lubricants for Yard Locomotives		
387	Other Supplies for Yard Locomotives	3222.13	2.36
388	Engine House Expenses—Yard		
389	Yard Supplies and Expenses		
404	Signal and Interlocker Operation	45.71	.12
405	Crossing Protection	790.93	.49
371	Superintendence		
410	Stationery and Printing	1035.97	.76
411	Other Expenses		
414	Insurance		
	Total Transportation Expenses	$12372.08	9.07

[fol. 190]

	General Expenses:		
451	Salaries and Expenses of General Officers		
452	Salaries and Expenses of Clerks and Attendants		
453	General Office Supplies and Expenses		
454	Law Expenses	$341.52	.25
455	Insurance		
458	Stationery and Printing		
460	Other Expenses		

DEFENDANT'S EXHIBIT 13—Continued

Summary		
M. of W. & S.	$3242.71	$2.38
M. of E.	4014.54	2.94
Transportation	12372.08	9.07
General	341.52	.25
Total	$19970.85	$14.64

Chicago, Ill.,
Jan. 12th, 1923.

DEFENDANT'S EXHIBIT 14

Pennsylvania Railroad System
Ill. Com. Com. Docket 12765

Statement Showing Output per Engine Hour and Cost Per Car for Elements of Service at Chicago, Illinois, P. C. C. & St. L. Station

Average Cost per engine hour.....$14.64

Elements of service	Cars per Hour	Cost per Car
1. Classification	16.0	$0.91
2. Transfer Service	11.2	1.22
3. Interchange	10.1	1.42
4. Weighing Cars	16.0	0.90
5. Icing Freight Cars	4.4	3.29
10. Freight House Switching, Loads	9.8	1.48
11. Team Track Switching, Loads	5.9	2.45
12. Industrial Switching, Loads	5.3	3.07

Chicago, Illinois, Jan. 12th, 1923.

[fol. 191] DEFENDANT'S EXHIBIT 15

Pennsylvania Railroad System

Illinois Commerce Commission Docket No. 12765

Statement Showing Cost of Various Elements of Switching Service Given to Carload Shipments of Brick and Total Switching Cost at Chicago, Ill., on Cars Unloaded on P. C. C. & St. L. Tracks.

—1919—

No. of Cars	Elements of service furnished	Total Cost Per Car	Total Cost
3	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	25.59
88	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	750.64
24	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	204.72
16	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	136.48
10	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	85.30
34	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	290.02
50	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	426.50
10	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	85.30
5	1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	6.40	32.00
2	1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	6.40	12.80
12	1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	6.40	76.80
2	1-.91; 2-1.22; 1-.91; 12-3.07; 1-.91; 2-1.22; 1-.91;	9.15	18.30
21	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	179.13
24	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	203.72
2	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	17.06
2	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	17.06
2	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	17.06
4	1-.91; 2-1.22; 1-.91; 11-2.45; 1-.91; 2-1.22; 1-.91;	8.53	34.12

DEFENDANT'S EXHIBIT 15—Continued

No. of Cars	Elements of service furnished	Total Cost Per Car	Total Cost
10	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	85.30
4	1-.91; 2-2.45; 1- .91; 2-1.22; 1- .91;	6.40	25.60
120	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	1023.60
13	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	110.89
58	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	494.74
23	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	196.19
72	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	614.16
47	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	400.91
4	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	34.12
9	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	76.77
6	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	51.18
33	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	281.45
11	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	93.83
2	1-.91; 2-1.22; 1- .91; 11-2.45; 1- .91; 2-1.22; 1-.91;	8.53	17.06
1	1-.91; 2-1.22; 1- .91; 12-3.07; 1- .91; 2-1.22; 1-.91;	9.15	9.15
1	1-.91; 2-1.22; 11-2.45; 1- .91; 2-1.22; 1- .91;	7.62	7.62
1	—1-.91; 11-2.45; 1- .91; 2-1.22; 1- .91;	6.40	6.40
726	——Total——	8.46	6141.61

Chicago, Illinois, January 12, 1923

Vol. 192] DEFENDANT'S EXHIBIT 16

Pennsylvania Railroad System

Illinois Commerce Commission Docket 12765

Statement Showing Detail of Switching Costs on Carload Shipments of Brick at Bernice, Ill.

	Station	Bernice, Ill.	
	Test Period (1919) Number of cars of Brick Handled	10-27 to 11-2 84	
Acct. No.	Name of Account	Amount	Cost Per Car
	M. of W. & S.		
202	Roadway Maintenance		
212	Ties		
214	Rails		
216	Other Track Material	3.35	0.04
218	Ballast		
220	Track Laying and Surfacing		
201	Superintendence		
274	Injuries to Persons		
275	Insurance	0.36	.004
276	Stationery and Printing		
277	Other Expenses		
	Total	3.71	.04
	M. of E.		
208	Steam Locomotives—Repairs	77.00	.92
209	Steam Locomotives—Depreciation		
210	Steam Locomotives—Retirements	4.95	.06

DEFENDANT'S EXHIBIT 16—Continued

Acct. No.	Name of Account	Amount	Cost Per Car
	Station	Bernice, Ill.	
	Test Period (1919)	10-27 to 11-2	
	Number of cars of Brick Handled	84	
301	Superintendence		
302	Shop Machinery		
332	Injuries to Persons		
333	Insurance	6.98	.08
334	Stationery and Printing		
335	Other Expenses		
	Total	88.93	1.06
	Transportation Expenses		
392	Train Enginemen		
401	Trainmen	99.75	1.19
394	Fuel for Road Locomotives		
397	Water for Road Locomotives		
398	Lubricants for Road Locomotives		
[fol. 193]			
399	Other Supplies for Road Locomotives	110.53	1.32
400	Engine House Expenses—Road		
402	Train Supplies and Expenses		
404	Signal and Interlocker Operation	31.68	.38
405	Crossing Protection	0.00	....
371	Superintendence		
410	Stationery and Printing		
411	Other Expenses	12.65	.15
414	Insurance		
	Total	254.61	3.04
	General Expenses		
451	Salaries and Expenses of General Officers		
452	Salaries and Expenses of Clerks and Attendants		
453	General Office Supplies and Expenses		
454	Law Expenses	7.72	.09
455	Insurance		
458	Stationery and Printing		
460	Other Expenses		
	Total	7.72	0.09
	Grand total	354.97	4.23

Chicago, Illinois, January 12, 1923.

DEFENDANT'S EXHIBIT 17

Pennsylvania Railroad System

Ill. Com. Com. Docket 12765

Statement Showing Terminal Cost of Handling Carload Shipments of Brick, Based on a Test Conducted Oct. 29, 30, 31, 1919 and Applied to Cars Handled June 25, 1918 to Feb. 29, 1920

Station	No. of Cars	Average Loading (Tons)	Clerical Cost Per Detention		Switching Cost		Total Cost		Total Cost		
			Total Cost	Per Car	Total Cost	Per Car	Total Cost	Per Car	Total Costs	Per Car	Per Ton Cents
Bernice, Ill.	401	44	244.61	0.61	505.26	1.26	1692.22	4.23	2442.09	6.09	14.9
Chicago, Ill.	726	44	137.94	0.19	3143.58	4.33	6141.61	8.46	9423.13	12.98	29.5
Combined Terminal Costs											44.4
Application of operating ratio of 66.67											66.6

Chicago, Ill., Jan. 12th, 1923.

[fol. 194] SECRETARY'S CERTIFICATE

Certificate of William W. Hart, secretary of Illinois Commerce Commission, that he is the secretary of the Illinois Commerce Commission and keeper of the records of said Commission. That the above and foregoing is a true, correct and complete copy of the complete record in the case of Illinois Brick Company versus Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company before said Commission and known as Case No. 12765 including docket entries, complaint, joint answer of respondents, amended complaint, answer of Pennsylvania Railroad Company, brief of Illinois Brick Company, brief and arguments filed by defendants, order of November 7, 1923, statement showing shipments, order of April 16, 1924, one hundred thirty-three pages of testimony presented and exhibits numbered 1 to 17, inclusive, as appears from the records and files in his office; that the same is given under his hand and seal of the Illinois Commerce Commission at Springfield, Illinois, the 27th day of April, 1933.

ELI FELSENTHAL, a witness for the plaintiff before the court:

Eli B. Felsenthal testified solely concerning plaintiff's attorney's fees.

[fol. 195] OFFERS IN EVIDENCE

Plaintiff's Exhibit 2, purporting to be a map of the Chicago switching district and the vicinity of, offered in evidence.

(Defendant's objection to Plaintiff's Exhibit 2 sustained.)

PLAINTIFF'S EXHIBIT 3

Plaintiff's Exhibit 3, being a notice from plaintiff to defendant to produce the original letter dated May 1, 1924, addressed to M. S. Connelly, assistant freight traffic man-

ager, Pennsylvania Railroad, Pittsburgh, Pennsylvania, and signed by the Illinois Brick Company by W. R. Allison, traffic manager, offered and received in evidence.

[fol. 196] Mr. Miller, attorney for plaintiff: I also desire to offer in evidence copies of the statements which were filed with the Commission and which relate to the amounts of the shipments, the amount of the freight that was paid, and the amount of reparation. Now, let me explain first, there is already in the record offered what appears to be a certified copy of these documents, but in making up this record, as far as I can find, the Commission inadvertently left out the part which they gave me, when they gave me a certified copy. There were two letters here which is not in the record that is already introduced as Plaintiff's Exhibit 1 and therefore introduced merely to correct the record that I have here.

Mr. Burke, attorney for defendant: Mark them one at a time. There will be some objections to them, so we can have our record, your Honor.

Mr. Miller: I offer these in evidence as Plaintiff's Exhibits 4 and 5.

The Court: Take them one at a time. Take 4 first.

Mr. Miller: Exhibit 4.

Mr. Burke: Do you offer in evidence Plaintiff's Exhibit 4?

Plaintiff's Exhibit 4 for identification is in words and figures as follows:

PLAINTIFF'S EXHIBIT 4

State of Illinois

Illinois Commerce Commission

Certificate

I, William W. Hart, do hereby certify that I am Secretary of the Illinois Commerce Commission of the State of Illinois and keeper of the records of said Commission.

I further certify that the attached statement is a true, correct and complete copy of a statement of claim for reparation [fol. 197] in the amount of $7,095.82 filed in Illinois Com-

merce Commission's docket No. 12765 entitled Illinois Brick Company v. Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company. I further certify that the attached copies of two letters under dates of December 29, 1923, and January 7, 1924, file RE-56173, signed by M. S. Connelly, Assistant Freight Traffic Manager, Pennsylvania Railroad Company, are true and correct copies of letters received by the Commission relative to the correctness of the attached statements.

Given under my hand and the seal of said Illinois Commerce Commission at Springfield, Illinois, this first day of June, A. D. 1933.

William W. Hart, Secretary.

Pennsylvania System

Chicago, December 29, 1923.

File Re-56175

Subject: Illinois Brick Company v. Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company. Illinois Commerce Commission Docket 12765.

Mr. Julius Johnson, Secy., Illinois Commerce Commission, Springfield, Illinois.

Dear Sir:

Please refer to the Commission's order in the above docket dated at Springfield the 7th day of November, 1923, wherein it is ordered that the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad and the Pennsylvania Railroad Company be required to file with the Commission within sixty days of the date of said order a statement showing car number and initial, date of shipment, et cetera, of all shipments of common brick, from Bernice, Illinois, to Chicago District points during the period August 26th, 1921, to February 15th, 1922.

We are inclosing herewith a copy of statements prepared, showing such shipments in detail required. Due to the [fol. 198] large amount of detailed work involved it will, however, be impossible for us to have the original of this statement properly checked against the records of our accounting department and certification as to the correctness

thereof made in time to file with the Commission on the date prescribed.

Under the circumstances we trust it will meet with the approval of your Commission for us to reserve the right to correct or amend the statements inclosed herewith as may be found necessary when the check of our accounting department has been completed, which we hope will be before February 1, 1924.

Will you kindly advise if this method of procedure is satisfactory?

Yours very truly, M. S. Connelly, Assistant Freight Traffic Manager.

Pennsylvania System

Chicago, January 7, 1924.

File Re-56175

Mr. Julius Johnson, Secy., Illinois Commerce Commission, Springfield, Illinois.

DEAR SIR:

We have your acknowledgment dated January 4, 1924, of our letter of December 29, 1923, with which were inclosed statements of carload shipments of common brick from Bernice, Illinois, to Chicago District points during the period of August 26th, 1921, to February 15th, 1922, submittal of which was required by the Commission's order in docket No. 12765 dated November 7, 1923.

Our letter of December 29, 1923, referred to, stated it would be impossible to have the statements checked by our accounting department and certification made as to the correctness thereof by January 7th, 1924, the date upon which the Commission's order required statements filed, and we accordingly, subject to your approval, reserved the right to amend or correct the statements forwarded to you as might be found necessary upon completion of the check by our accounting department.

[fol. 199] The purpose of this communication is to advise that, according to the investigation of our accounting department, the amounts of the freight charges claimed paid as appearing on the statements in question, are correct.

This letter may, therefore, be regarded as certification of the mathematical correctness of the statements referred

to; it is not, however, under any construction, to be considered as an admission that the Commission's findings in its docket No. 12765 are correct or that the complainant paid or bore the charges, or was damaged thereby or is entitled to reparation.

Yours truly, M. S. Connelly, Assistant Freight Traffic Manager.

Attached to the foregoing certificate and two letters were six sheets showing shipments of common brick in carloads from Bernice, Illinois, to the Chicago district via P. C. C. & St. L. R. R. Co., the sixth sheet being a recapitulation of the said shipments and all of said sheets being exact duplicates of similar sheets heretofore referred to.

Mr. Burke: I object to its receipt in evidence, first, because it appears to contradict the exhibit that plaintiff has already offered in evidence as Exhibit 1. Second, on the face of it it is an incorrect certificate, because it certifies that the attached statement is a true and correct and complete copy of a statement of claim for reparation in the amount of $7,095.82, whereas on the face of it it appears that the attached statement is not a statement of claim for reparation. It further certifies that the two letters certified were letters that were received in the mail, apparently by the Illinois Commerce Commission. It does not state that [fol. 200] they were ever offered or received in evidence on the hearing of the case before the Commission, and for the further reason that there is no evidence admissible outside of the certified copy of the record of the Illinois Commerce Commission in this case.

The Court: I will reserve a ruling on this.

Mr. Miller: I offer this as Plaintiff's Exhibit 5.

Plaintiff's Exhibit 5 for identification was as follows:

PLAINTIFF'S EXHIBIT 5

State of Illinois

Illinois Commerce Commission

Certificate

I, William W. Hart, hereby certify that I am Secretary of the Illinois Commerce Commission of the State of Illinois and keeper of the records of said Commission.

I further certify that the attached statement is a true, correct and complete copy of a statement of claim for reparation in the amount of $21,869.90 filed in Illinois Commerce Commission's docket No. 12765 entitled Illinois Brick Company versus Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company.

I further certify that the attached copies of two letters under dates of December 29, 1923, and January 7, 1924, file RE-56173, signed by M. S. Connelly, Assistant Freight Traffic Manager, Pennsylvania Railroad Company, are true and correct copies of letters received by the Commission relative to the correctness of the attached statements.

Given under my hand and seal of the said Illinois Commerce Commission at Springfield, Illinois, this 1st day of June, A. D. 1933.

William W. Hart, Secretary.

[fol. 201] Pennsylvania System

Chicago, December 29, 1923.

File re-56175

Subject: Illinois Brick Company v. Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company. Illinois Commerce Commission Docket 12765.

Mr. Julius Johnson, Secretary, Illinois Commerce Commission, Springfield, Illinois.

Dear Sir:

Please refer to the Commission's order in the above docket dated at Springfield, the 7th day of November, 1923, wherein it is ordered that the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad and the Pennsylvania Railroad Company, be required to file with the Commission within sixty days of the date of said order a statement showing the car number and initial, date of shipment, et cetera, of all shipments of common brick, from Bernice, Illinois, to Chicago District points during the period August 26th, 1921, to February 15th, 1922.

We are inclosing herewith a copy of statements prepared, showing such shipments in detail required. Due

to the large amount of detail work involved it will, however, be impossible for us to have the original of this statement properly checked against the records of our accounting department and certification as to the correctness thereof made in time to file with the Commission on the date prescribed.

Under the circumstances we trust it will meet with the approval of your Commission for us to reserve the right to correct or amend the statements inclosed herein as may be found necessary when the check of our accounting department has been completed, which we hope will be before February 1, 1924.

Will you kindly advise if this method of procedure is satisfactory?

Yours truly, M. S. Connelly, Assistant Freight Traffic Manager.

[fol. 202] Pennsylvania System

Chicago, January 7, 1924.

File re-56175

Subject: Illinois Brick Company v. Pennsylvania Railroad Co. and the Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co. Illinois Commerce Commission Docket 12765.

Mr. Julius Johnson, Sec'y, Illinois Commerce Commission, Springfield, Illinois.

DEAR SIR:

We have your acknowledgment dated January 4, 1924, of our letter of December 29, 1923, with which were inclosed statements of carload shipments of common brick from Bernice, Illinois, to Chicago District points during the period August 26th, 1921, to February 15th, 1922, submittal of which was required by the Commission's order in Docket No. 12765, dated November 7, 1923.

Our letter of December 29, 1923, referred to, stated it would be impossible to have the statements checked by our accounting department and certification made as to the correctness thereof by January 7th, 1924, the date upon which the Commission's order required statements filed, and we accordingly, subject to your approval, reserved the right

to amend or correct the statements forwarded to you as might be found necessary upon completion of the check by our accounting department.

The purpose of this communication is to advise that according to the investigation of our accounting department the amounts of the freight charges claimed paid as appearing on the statements in question are correct.

This letter may, therefore, be regarded as certification of the mathematical correctness of the statements referred to; it is not, however, under any construction to be considered as an admission that the Commission's findings in its docket No. 12765 are correct, or that the complainant paid or bore the charges, or was damages thereby, or is entitled to reparation.

Yours truly, M. S. Connelly, Assistant Freight Traffic Manager.

[fol. 203] Attached to the foregoing certificate and two letters were fifteen sheets showing shipments of common brick in carloads from Bernice, Illinois, to the Chicago District via Pennsylvania Railroad, Western Lines, and on the 15th sheet thereof there appeared a recapitulation of all of said shipments. All of said sheets are exact duplicates of similar sheets appearing on pages 233 to 252 of the transcript of the record and hereinbefore in this abstract set forth in haec verba. (Rec., 234, 236, 238, 240, 242, 243 to 252; Abst., 51, 53, 55, 57, 59, 61-70.)

Mr. Burke: Same objection to Exhibit 5 as to Exhibit 4.

The Court: The same ruling. The court reserves the ruling on that and will enter a ruling before the final decision in this case.

W. R. Allison, a witness for the plaintiff before the court:

Direct examination.

My name is W. R. Allison. I am secretary and treasurer of the Illinois Brick Company. I have been with them over twenty-two years. In 1920 and 1921 and 1922 I was traffic manager. I have been traffic manager for about eleven years. I was a witness in the case before the Illinois Commerce Commission a record of which has been introduced as Plaintiff's Exhibit 1. Plaintiff's Exhibit 6 is a carbon

copy of a letter dated May 1, 1924, addressed to M. S. Connelly, assistant freight traffic manager of the Pennsylvania Railroad. The original was signed by me and mailed to Mr. Connelly at Pittsburgh. Plaintiff's Exhibit 6 received in evidence was as follows:

[fol. 204] PLAINTIFF'S EXHIBIT 6

Mr. M. S. Connelly, A. F. T. M., Pennsylvania Railroad System, Pittsburgh, Pa.

Subject: Docket 12765

DEAR SIR:

We call your attention to the order of the Illinois Commerce Commission in the above case dated April 16th, directing your company to pay us reparation to the amount of $28,965.72 and interest at the legal rate from date of payment of charges on or before May 1st, 1924.

We have not received payment and will ask you to advise why it has not been sent.

Yours very truly, Illinois Brick Company, —— ——,
Traffic Manager.

WRA:AK.

The defendants in this case have not paid the amount of reparation mentioned in Plaintiff's Exhibit 6 or any part thereof. On several occasions I made requests or demands upon the defendants. Shortly after Plaintiff's Exhibit 6 was written I discussed the matter with Mr. Weller of the Pennsylvania Railroad. He was chief freight traffic man in Chicago. I repeated my demand for payment. The last time I saw Mr. Weller was about two years ago in his office.

The Illinois Brick Company made shipments of intrastate brick from Bernice, Illinois, during the period from October 28, 1920, to February 15, 1922.

I prepared Plaintiff's Exhibits 4 and 5, or they were prepared under my instructions. I was present when they were being prepared. I prepared said exhibits from the original bills of lading and the original freight bills. The original paid freight bills and the original bills of lading were before me when I was preparing those documents. After they were prepared they were attached to this state-

[fol. 205] ment and sent to the Pennsylvania Railroad. Said documents correctly represent the facts therein stated. The Illinois Brick Company paid the freight charges that are shown on said exhibits to the Pennsylvania Railroad by check. The shipments were prepaid. The Illinois Brick Company did not secure any revision or rebate from any other person of the said freight charges paid by them. At the time the rates of 93½ cents, 94½ cents and 98½ cents were in effect on common brick from Bernice into the Chicago switching district we were in competition with brick from other points.

Mr. Miller, attorney for plaintiff:

Q. What effect, if any, would the payment of the charges, freight charges of 98½ cents portend, 94½ and 93½ cents, on common brick from Bernice to Chicago switching district have upon the business and profits of the Illinois Brick Company?

(Objection of defendants sustained but witness permitted to answer for the purpose of the record.)

A. It naturally reduced the profits by the amounts of what we consider excess freight charges.

(Ruling on objection and motion to strike reserved.)

Mr. Miller:

Q. Was the Illinois Brick Company able to secure any greater or higher profits upon its commodity because of the increased freight rates than was secured by its competitors located within the Chicago switching district?

(Objection sustained but witness permitted to answer for the purpose of the record.)

A. It was not able to increase the price.

(Ruling on objection and motion to strike out answer reserved.)

[fols. 206-208] Mr. Miller:

Q. Explain why not.

(Objection overruled.)

A. If we had increased the price of brick from Bernice we could not sell any.

(Ruling on motion to strike the answer was reserved.)

Q. Explain why you cannot sell any if you increase the price.

(Objection of defendant overruled.)

A. It would be above the market price of brick and you could not sell any brick above the market price.

(Ruling on defendant's motion to strike said answer was reserved.)

Q. Were you in competition with the manufacturers of brick whose plants were located within the district?

(Objection overruled.)

A. We are. In this case we have been required to secure the services of attorneys to represent us. We have incurred expense or obligation to pay the attorney's fees.

A. R. Miller, a witness for the plaintiff, before the court:

A. R. Miller testified solely concerning plaintiff's attorney's fees.

[fol. 209] Eli Felsenthal, witness for the plaintiff before the court, recalled:

Eli Felsenthal testified further solely concerning plaintiff's attorney's fees.

[fol. 210] Motion to Find Issues for Defendants, etc.

Plaintiff closes its case. Motion of defendants jointly and severally to find the issues for the defendants and also to find the defendants not guilty. Said motion denied and defendants except.

Defendant's Exhibit 1

Defendant's Exhibit 1 received in evidence was a certified copy of the order of the Illinois Commerce Commission dated August 10, 1920, in case No. 10620.

The petition that resulted in said order was a petition [fol. 211] by carriers in the State of Illinois for an increase in freight rates to conform to advances that may be allowed by the Interstate Commerce Commission, et cetera. It is recited in said order that the petitioners tendered in evidence a transcript of the record before the Interstate Commerce Commission and that the same was received by agreement of the parties; that evidence was also offered concerning the award of the United States Railroad Labor Board and the effect of that award; that the Interstate Commerce Commission file its report and order in ex parte 74, 58 I. C. C. 220-26260, a copy of which is attached to said order and made a part thereof; that the order in this case is of an emergency or provisional nature because obviously a final order could not be entered at this time; that the carriers show that the emergency arising from the large increase in wages granted to employes which was made retroactive to May 1, 1920, is of so grave a nature that it will be impossible for them to obtain the revenues with which to continue to operate the railroads unless the advanced rates authorized by the Interstate Commerce Commission are put into effect at an early date; that unless advances of intrastate rates are granted effective at substantially the same as the interstate rates there will be wide discrimination between interstate and intrastate rates and that the result will be a chaotic condition of the transportation service and will be disastrous to the business interests of the country. The Commission states in said order that they deal with said application as an emergency application and that to apply to it the rules by which they are governed in passing upon such applications would serve no useful [fol. 212] purpose and that it would be impossible to attempt to analyze the vast volume of evidence; that they state briefly the rules by which they are governed in passing upon emergency applications and point out certain dominant provisions in the order of the Interstate Commerce Commission and then state their conclusions and findings. The Commission states, among other things, that the intrastate freight rates now in force on the lines of the carriers in Illinois are clearly insufficient; that they will not produce revenues sufficient to pay operating expenses and taxes and take care of depreciation and in addition provide a return

upon any valuation which it is reasonably possible to place upon the property of the applicant which is employed in the service involved in the proceeding; that in fact the existing rates are plainly confiscatory; that the conditions which entitle the applicants to relief are applicable generally to public utilities throughout the United States; that the wages of labor and the cost of materials and supplies have increased to such an extent that prompt relief must be granted or the utilities will be unable to continue their operations.

The order then proceeds as follows: We think that the Interstate Commerce Commission had indicated the standard which we should follow in granting this temporary increase, by providing for a 33⅓ per cent increase in joint or single line through rates between points in one group and points in other groups. As pointed out above, the railroads in this state are in three groups. In the eastern group the Interstate Commerce Commission has allowed a 40 per cent increase, in the western group a 35 per cent increase, and in the southern group a 25 per cent increase. Taking into [fol. 213] consideration the facts as to the New England roads and the southwestern roads, above pointed out, 33⅓ per cent represents a fair average of the increases granted by the Interstate Commerce Commission in these three groups. In view of the provisions of the order of the Interstate Commerce Commission, we think that an advance of 33⅓ per cent in freight rates within this state will produce a condition which is free from unjust or unreasonable discrimination as to any interstate rates authorized by the Interstate Commerce Commission. Certainly this is true for the purposes of this temporary order and until this Commission as well as the Interstate Commerce Commission can give further consideration to the points which are expressly reserved in the decision of the Interstate Commerce Commission. * * *

It must be understood that this increase is authorized upon condition that these applicants shall render adequate and efficient service. The carriers have put forward lack of revenue as an excuse for many deficiencies in service. It is expected and will be required that every effort will be made by the carriers to bring up the standard of efficiency in the service. The Commission finds from the evidence:

1. Petitioners have shown cause for allowing increases hereinafter specified without requiring the thirty days' notice provided in Section 36 of the Public Utilities Act.

2. The operating expenses of petitioners have been largely increased by advances in wages which are now effective and by increased cost in supplies and materials, and will be unable to obtain money with which to operate their lines unless prompt relief is granted.

3. The charges for freight service, including switching [fol. 214] and certain special service, mentioned hereinafter, now in force on the lines of the applicants within this state for service within the jurisdiction of this Commission, are insufficient, and, to compel the carriers to adhere to such charges would amount to confiscation of their property and a deprivation of their rights guaranteed by the state and the federal constitutions.

4. For the purpose of this temporary order the charges for services hereinafter authorized are just and reasonable and will produce revenue sufficient to take care of the operating expenses and taxes of petitioners and interveners, to provide a reasonable allowance for depreciation, and to pay a fair return upon the fair value of the property of petitioners and interveners as indicated by the record in this case to be the reasonably probable fair value of said property, used and useful in the service, of said carriers within the jurisdiction of this Commission.

5. The rates hereinafter authorized are just and reasonable temporary rates and which will be fair both to the public and to the petitioners and interveners to permit said rates to go into effect, and to make such readjustment of the same as may be found to be necessary from the result of actual experience. The fair return to which said petitioners and interveners are entitled is a return of 5½ per cent upon the aggregate value of the railroad property of such carriers held for and used in the service of transportation subject to the jurisdiction of this Commission, and one-half of one per cent in addition. Under honest, efficient, and economical management, and reasonable expenditures for maintenance of ways, structures and equipment, the rates hereinafter authorized will enable the carriers to earn

[fol. 215] an aggregate annual railway operating income equal, as near as may be, to the return of 5½ per cent upon the aggregate value for the purposes of this proceeding of the railway properties of such carriers held for and used in the service of transportation which is within the jurisdiction of this Commission, and one-half of one per cent in addition thereto. * * * It is ordered that Pennsylvania Railroad Company, Pittsburgh, Cincinnati, Chicago & St. Louis Railway and other railroads be and they are hereby authorized to put into effect upon not less than five days' notice to the Commission and to the public, by filing and posting in the manner prescribed in the Public Utilities Act, schedules of rates constructed in accordance with the directions hereinafter set forth, and including the increases hereinafter specified, providing the rates hereinafter authorized shall not go into effect prior to those authorized by the Interstate Commerce Commission in ex parte 74 above mentioned. The rates herein authorized shall continue in effect until the further order of this Commission and the Commission expressly reserves the right to modify the same either upon its own motion or upon the complaint or application of the petitioners, or interveners, or any other party in interest.

It is further ordered that the authority herein granted shall not apply to any rates or charges filed with the Commission to become effective later than October 10, 1920.

It is further ordered that for the purpose of simplifying tariff publications, the aforesaid carriers are authorized to publish and file increased rates authorized herein, in blanket supplements when found expedient and to depart from the [fol. 216] terms of Rules 8-e and 2-a of this Commission's tariff circular No. 1 to the same extent that said carriers have been authorized by the Interstate Commerce Commission to depart from similar tariff rules and regulations prescribed by said Commission. The increases herein authorized and the directions for the construction of the schedules based upon said increases are as follows:

1. That class rates for the transportation of freight approved for uniform application throughout the State of Illinois by order 10400, issued August 3, 1920, may be increased 33⅓ per cent.

2. That rates or charges for switching, transit, weighing, diversion, reconsignment, lighterage, floatage, storage (not including track storage) and transfer where carriers provide separate charges against shippers for such service, which were in effect February 29, 1920, or such rates as have been authorized or directed to be substituted therefor by authority or order of this Commission may be increased 33⅓ per cent. The charges for other special services not specifically provided for herein are not to be subjected to the general increases herein authorized.

4. That all other freight rates which were in effect February 29, 1920, or such rates as have been substituted therefor by authority of this Commission, or have been directed to be substituted therefor by order of this Commission, may be increased 33⅓ per cent, provided that such increased rates shall not exceed the maximum scale of rates prescribed by this order.

5. That the percentage increases authorized herein shall be applied to the maximum scale of freight rates, other than class rates, published in Illinois Commissioners' Clas-
[fol. 217] sification No. 10 and supplements thereto, as increased by General Order No. 28 issued May 25, 1918, by the Director General of Railroads of the United States Railroad Administration, and such rates together with the class rates authorized herein in paragraph 1 subject to Illinois Commissioners' Classification No. 11, shall be the maximum rates for single line intrastate application by each of the common carriers, subject to the jurisdiction of this Commission.

That where rates are stated in amounts per 100 pounds or any other unit, except as provided in the succeeding paragraph, fractions of less than ¼ of a cent will be omitted. Fractions of ¼ of a cent or greater but less than ¾ of a cent will be stated as ½ cent. Fractions of ¾ of a cent or greater will be increased to the next whole cent;

That where rates are stated in dollars per carload, including articles moving on their own wheels, when not stated in amounts per 100 pounds or per ton, amounts less than 25 cents will be dropped; thus, $25.24 will be stated $25. Amounts of 25 cents or more but less than 75 cents will be stated as 50 cents; thus $25.65 will be stated as

$25.50. Amounts of 75 cents or more but less than $1 will be raised to the next dollar.

Attached to the foregoing order of the Illinois Commerce Commission is a copy of Interstate Commerce Commission decision and opinion in ex parte 74 in the matter of the applications of carriers in official, southern and western classification territories for authority to increase rates.

Defendant's Exhibit 2 offered and received in evidence is a copy of the order and decision of the Interstate Commerce Commission No. 11703 in the matter of intrastate [fol. 218] rates within the State of Illinois and is as follows:

DEFENDANT'S EXHIBIT 2

No. 11703

In the Matter of Intrastate Rates Within the State of Illinois

Submitted December 14, 1920. Decided January 11, 1921

Certain rates and charges, for freight services and transportation of milk and cream, required by state authority to be maintained by the respondent carriers within the state of Illinois, found to be lower than the corresponding rates and charges authorized in Ex Parte 74, Increased Rates, 1920, 58 I. C. C., 220 and 302, and to be unduly preferential of intrastate traffic and shippers and of localities within the state, unduly prejudicial to interstate traffic and shippers and to localities outside the state, and unduly, unjustly and unreasonably to discriminate against interstate commerce.

Appearances shown in previous report, 59 I. C. C., 350.

Supplemental Report of the Commission

McChord, Commissioner:

The question here is with respect to the charges for freight services and for the transportation of milk and

cream intrastate in Illinois as compared with the charges applied by the Illinois carriers to shipments moving in interstate and foreign commerce. The like question as to passenger fares has been in part disposed of in an earlier report, Intrastate Rates Within Illinois, 59 I. C. C. 350, and will be further considered in another supplemental report.

In Ex Parte 74, Increased Rates, 1920, 58 I. C. C. 220, decided July 29, 1920, this Commission, under authority conferred upon it by the interstate commerce act, divided the country into four rate groups, namely, eastern, southern, western, and mountain-Pacific. We found, subject to a few minor qualifications, that for freight services the carriers might increase their charges 40 per cent in the eastern group, 25 per cent in the southern group, 35 per cent in the western group, 25 per cent in the mountain-Pacific group, [fol. 219] and 33⅓ per cent between groups in cases where joint or single-line through rates applied. For other than freight services we prescribed uniform increases for the entire country. We held that excess-baggage rates might be increased 20 per cent, provided that where stated as a percentage of or dependent upon passenger fares the increase in the latter would automatically effect the increase in the excess-baggage charges. On milk and cream, which are usually carried in passenger trains and the revenue from which is not included in freight revenue, we authorized an increase in rates of 20 per cent. It was our conclusion that these various increases would result in transportation charges "not unreasonable in the aggregate under section 1 of the act and would enable the carriers in the respective groups, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of 5½ per cent upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and one-half of 1 per cent in addition." The increased rates and charges were put into effect, interstate, August 26, 1920.

After our decision was announced some question arose as to what increase in charges for fright services was intended for what has long been known as the Illinois district,

which includes the state of Illinois and certain adjacent territory.[1]

The uncertainty grew out of the fact that the boundary line we had drawn between the eastern and the western groups cut the Illinois River at or near Grafton, Ill., thence via the Illinois River to Pekin, Ill., and thence south and east of the Atchison, Topeka & Santa Fe Railway from [fol. 220] Pekin through Joliet and Streator to Chicago, Ill. This line appeared to us to represent in a general way the western termini of lines in the eastern district. Upon request for a definite announcement, the question as to what increase should apply in the Illinois district was given special consideration. In a supplemental report, Authority to Increase Rates, 58 I. C. C., 302, August 11, 1920, we held that the Illinois district should be considered as within the eastern group for the purposes of applying the increases on interstate traffic between points in that district and on traffic between points in the Illinois district on the one hand and points in official classification territory east of the Indiana-Illinois state line on the other, and that increases of 40 per cent might be made in the rates and that points within the Illinois district should be treated as in the western group on traffic subject to joint or single-line through rates between points in that district on the one hand and points lying within the boundaries of the western group (west or north of the Illinois district) on the other, and that increases of 35 per cent might be made in the rates on such traffic. In other words, we held that these increases would be necessary to yield the prescribed return for the carriers concerned.

The increases for the Illinois district were not to be applied to the rate structure in that district as it existed at the time our decisions were announced, but certain pre-

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[1] Points in the Chicago switching district in Indiana; points in Wisconsin on and south of the Chicago, Milwaukee & St. Paul Railway, Milwaukee to Madison, the Chicago & North Western Railway, Madison to Dodgeville, and on and east of the Illinois Central, Dodgeville to the Illinois state line; also points on the west bank of the Mississippi River to which joint through rates subject to the official classification are now in effect from points in trunk line and central territories.

liminary readjustments were expected, which we shall proceed to explain. Until early in 1920 the rates in effect throughout the Illinois district were in general those which had been prescribed or allowed by the Public Utilities Commission of Illinois for intrastate traffic, plus the increases provided by General Order No. 28 of the Director General of Railroads, effective June 25, 1918. The class rates, which were governed by the so-called Illinois classification, upon the whole were perhaps 15 or 20 per cent lower than those applied in what is known as central territory, embracing generally Indiana, Ohio, Michigan, and points in western New York, Pennsylvania, and West Virginia; and when considered in connection with the lower ratings in the Illinois classification than those obtaining in the official [fol. 221] classification the actual rates charged in the Illinois district were perhaps 36 per cent lower than in central territory. The commodity rates also, in Illinois district, upon the whole appeared relatively lower than in central territory. In Illinois Classification, 55 I. C. C., 290; 56 I. C. C. 202 and 687, a proceeding instituted by us at the request of the Director General to determine what classification and what scale of class and commodity rates would be proper for the Illinois district to remove alleged undue prejudice to Indiana and its shippers, we recommended that the district be divided by a line drawn along the Illinois River from its junction with the Mississippi to Pekin, Ill., and thence via the line of Atchison, Topeka & Santa Fe Railway through Joliet and Streator to Chicago, Ill., which was substantially the line later used in connection with the grouping of the country, as above referred to, for the purposes of Increased Rates, 1920, supra; that the Illinois classification and the Illinois district scale of class rates be canceled and that south of the line above described the official classification and the central territory scale of class rates, referred to in the report as the Disque scale, be applied; that north of said line the western classification and some scale of class rates that would harmonize with the rates in Iowa and Wisconsin be adopted, that the latter classification and scale be used from the section north of the line to the section south of the line; and that from the section south of the line to the section north of the line the official classification and the central territory scale be applied. As to most commodity rates no changes were recom-

mended, for the reason that the record then before us did not warrant a definite conclusion that the lower basis in Illinois was actually injurious or prejudicial to Indiana within the meaning of section 3 of the interstate commerce act.

In February, 1920, the carriers put our recommendations into effect so far as they related to the establishment of the official classification and the central territory scale of rates in the southern section and from the southern to the northern section; but they made no change in the rates in the northern section or from that section to the southern [fol. 222] section, for the reason that an appropriate scale had not been devised and agreed upon by the parties in interest. A number of conferences were had between representatives of the Illinois commission, shippers and carriers, and this Commission, and a formal hearing was held by the Illinois commission. Finally, a compromise scale of 10 classes, for application throughout the Illinois district on both state and interstate traffic, was agreed to by the principal parties concerned. The compromise scale was the same as the central territory scale on the first five classes, while the five lower classes were graded down in accordance with fixed percentages of first class. The entire scale was to be governed by a new Illinois classification acceptable to all parties. This new classification is understood to conform to the official classification, except where the competition from the west that was met by Illinois distributors has made it desirable to use the ratings provided in western classification, in which case the western classification ratings have been adopted for the entire Illinois district. On many important articles of traffic this classification affords Illinois shippers lower ratings than apply generally east of the Mississippi River. In a letter dated June 17, 1920, to the parties in the case referred to, we sanctioned the establishment of this basis instead of that we had formally recommended, and it received the sanction of the Illinois commission August 3, 1920. The new class rates on this basis were put into effect August 5, 1920. In the northern section of the Illinois district this meant an average increase of perhaps 16 per cent; in the southern section there were some comparatively unimportant reductions on the lower classes. It was understood when these rates were authorized that they would be the basis upon which such general increases

as might later be allowed by both commissions would be built.

In the meantime the carriers operating in the State of Illinois had pending before the Illinois commission an application for the same increases in intrastate transportation charges as we should find and later found reasonable for interstate application in the eastern district. On Au- [fol. 223] gust 10 that commission authorized a "temporary" [1] increase of 53½ per cent in the rates above referred to and in all rates and charges for freight services in effect at the end of federal control, February 29, 1920, or made effective subsequently with the authority or at the direction of the Illinois commission. An increase of 20 per cent in excess-baggage charges was also authorized. Except as to excess-baggage charges stated in percentages of passenger fares, which therefore were not changed, tariffs were filed

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[1] The order of the Illinois commission provided in part as follows:

It is further Ordered that this cause be set down for hearing at Chicago, Illinois, on Thursday, October 21, 1920 (later changed to September 22, 1920), at ten o'clock a. m., and the aforesaid carriers are directed to present at that time more specific evidence as to the valuation of their properties within the State of Illinois, and as to operating revenues and operating expenses within this State. They are also directed to present more specific evidence from which the Commission may determine as accurately as may be possible the facts relative to that portion of their business which is subject to the control of this Commission. Illustrating one of the subjects as to which, in our opinion, additional proof is required, we direct the attention of the aforesaid carriers to pages 344 to 347 of the Congressional Record of December 9, 1919. The order in this case has been made upon a showing of grave emergency and upon a record which in important respects is unsatisfactory and incomplete, and the further continuance of the authority herein contained is conditioned upon the presentation, by the petitioners and interveners at as early a date as is possible, of the evidence which complies substantially with the rules which this Commission is required to follow in making valuations of property for rate-making and in fixing permanent rates.

giving effect to these increases, August 26, 1920, the date on which the interstate increases were made. On milk and cream the Illinois commission permitted no increases.

As stated in our previous report herein, this proceeding was subsequently instituted by us upon the petition of the steam railroads in Illinois, together with the Chicago, Lake Shore & South Bend Railway, an electric line; and the receiver of the Aurora, Elgin & Chicago Railroad intervened, seeking the same relief, so far as the electric third-rail division of that road is concerned, as might be granted the other carriers.

It will be observed that the increase of 33⅓ per cent granted by the Illinois commission in charges for freight services was the same as that authorized by us for application to joint or single-line through rates between general [fol. 224] rate groups. It is stated on behalf of the Illinois commission that it adopted this figure largely because in our original report in Increased Rates, 1920, supra, part of Illinois was recognized as in western territory and part as in eastern territory, thus making much of the intrastate traffic intergroup. The further statement is made on behalf of the Illinois commission that the conclusion it reached was believed to be in conformity with the conclusion announced in our original report. At the time it rendered its decision the Illinois Commission was not advised of our supplemental report fixing 40 per cent as the proper increase for the Illinois district. Subsequently that commission reopened its case for further consideration in the light of our supplemental report, and further hearing was had September 2, 1920, in which a representative of this Commission, at the invitation of the Illinois commission, participated. When the instant case came on for hearing the Illinois commission had not rendered a supplemental decision, and it requested a continuance in order that it might have time to receive and consider certain data as to value and as to the revenues and expenses of the lines in Illinois, upon which it might base its final conclusion. This case was accordingly continued to October 6, and then to October 7, 1920, at which time we were again advised that the Illinois commission had not reached a final decision. Our hearing, however, was completed on that date.

On October 18 the Illinois commission issued its supplemental order, which, in accordance with permission given

at the hearing, was filed in the record in this case. This supplemental order modified the previous order in that it prescribed for intrastate application, in lieu of the 33⅓ per cent increase, a new scale of class rates and seven different scales of commodity rates on a number of important articles of traffic. It was stated in the report of the Illinois commission that these schedules would not increase intrastate rates 40 per cent but would increase them in excess of 35 per cent. The carriers assert that the new scales will yield less than 33⅓ per cent, but the data upon which they base this conclusion are subject to serious question. Rates [fol. 225] and charges for all freight services, other than covered by the new scales, were, subject to a few minor qualifications, authorized to be increased 35 per cent, which was the amount of the increase we found would be proper for the western district in Increased Rates, 1920, supra. Incidentally, considerably more than one-half of the railroad mileage in Illinois is that of western lines. The new rates, like those first prescribed, were understood to be temporary.[1] Tariffs were filed in accordance with the Illinois commission's supplemental order and, subject to a few exceptions,[2] became effective November 15, 1920.

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[1] In this connection, after referring to the "necessity of the carriers making out a case which complies with the rules by which this (the state) commission is governed under the state statute from which it derives its authority," the Illinois commission said:

"This case, therefore, will be set for further hearing and the carriers required to submit proof complying with the principles above stated. Adequate time will be given for this purpose, and unless the temporary rates which have been permitted to go into effect and to continue as modified by this order are sustained by competent and sufficient proof, the authority for the same, so far as it may depend upon the order of this Commission, must be withdrawn."

[2](a) Coal and articles taking coal rates, effective date postponed until January 15, subject to further hearings and conferences in the meantime.

(b) At a conference between representatives of shippers and carriers and representatives of the Illinois commission

Evidence offered by the carriers indicates that if the charges for freight services and the rates on milk and cream that were in effect at the time of the hearing are continued for one year, and there is the same intrastate movement during that year as in the calendar year 1919, the loss to the carriers, due to their failure to secure the same increases intrastate as interstate, will be about $3,000,000. Stated otherwise, if the increased charges sought are proper but are not put into effect, rates on the other traffic of the carriers that serve Illinois must be disproportionately increased.

[fol. 226] All the Illinois carriers involved are engaged in the handling of both state and interstate traffic. Generally the same train and often the same car that carried the intrastate traffic carried the interstate traffic.

Near the borders of the State of Illinois are such points as St. Louis and Hanibal, Mo.; Keokuk, Davenport, Muscatine, Burlington, Dubuque, and Clinton, Iowa; Beloit, Janesville, Madison, and Milwaukee, Wis.; Gary, Indiana Harbor, Hammond, Whiting, Lafayette, Terre Haute, and Evansville, Ind.; and Paducah, Ky.

All, or practically all, such points are in constant competition, more or less, with cities in Illinois for population, industrial development, and business growth.

When individual manufacturers, jobbers, and dealers in these cities outside the state draw their coal, for instance, from Illinois mines they must pay relatively greater increases than their competitors just across the border in Illinois, and in shipping their goods into Illinois they must pay relatively more than the Illinois distributors. Thus a double rate disadvantage is put upon the interstate shipper and his locality. As every business man knows, a competi-

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and this Commission the representative of the Illinois commission stated he would recommend to his commission an increase of 40 per cent in the rates on grain to St. Louis and Cairo for the purpose of working out an equalization of a troublesome situation which was the subject of the conference. In the meantime the effective date of all of the balance of the grain rates provided for in the Illinois commission's supplemental order was postponed until December 15. Tariffs carrying out the adjustment agreed upon were subsequently filed and are now in effect.

tor must often, if not generally, absorb the difference in freight rates against him or withdraw from the field. That such differences are prejudicial is a matter of common knowledge.

One of the most important instances of discrimination is found in the Chicago industrial district, which includes not only territory in Illinois in and about the city of Chicago, but reaches across the state line into Indiana, embracing such points as Gary, Indiana Harbor, and Hammond, with their great steel mills and other industries. These industries when they located in these outlying districts, did so with the distinct understanding that they would forever be treated, from a rate standpoint, like all other points in the Chicago district, as though they were located within the city of Chicago. That is, Chicago rates were to apply to and from the entire industrial district. This arrangement had been adhered to in good faith for many years, but [fol. 227] on August 26, 1920, the date on which the increases were made effective on both state and interstate traffic, the long-standing parity was destroyed, so far as traffic to and from points in Illinois was concerned, by the carriers increasing the rates between the Indiana points in the Chicago district and all stations in Illinois 40 per cent, under our finding, and between the Illinois points in that district and all stations in Illinois a lower percentage, under the Illinois commission's finding. That this treatment of the Indiana cities puts a cloud on their prospects and injures the ability of their industries to do business in Illinois against competitors favored by lower rates intrastate cannot be denied.

St. Louis, Mo., and East St. Louis, Illinois, are practically one community, yet the former's rates to and from points in Illinois have been increased 40 per cent and the latter's materially less. The effect, of course, is similar to that in the Chicago district. For instance, prior to August 26 the rates on coal from the Illinois mines to St. Louis were but 20 cents per ton higher than to East St. Louis, but since that date they have been 34 cents higher, not because of any change in conditions of transportation, but because the Illinois commission's judgment as to what was a reasonable increase happened to be different from ours.

Situations such as above described can be found at various points around the borders of the state.

Disparities between Illinois intrastate rates to and from Chicago and interstate rates between Illinois points and St. Louis were the subject of litigation in Business Men's League of St. Louis v. A., T. & S. F. Ry. Co., 44 I. C. C. 308, wherein we found that the then existing adjustment was unduly prejudicial to St. Louis. The present rates present a similar situation.

In Illinois Classification, supra, it appeared that Indiana jobbers were shipping into Illinois in competition with Illinois shippers, but were confronted with relatively higher rates than were paid by their Illinois competitors to points in the same state. Except as to commodity rates in general, the situation was remedied as explained earlier in this report, but a similar difficulty has now been created.

[fol. 228] Certain routes from Illinois coal mines to Illinois destinations are interstate while others are intrastate. Prior to August 26 the rates in most instances were the same via the different routes, but since that date the interstate rates from a given mine or group of mines are higher than the intrastate rates. The result is that interstate traffic has been practically destroyed by the coal being diverted to the intrastate routes. In other words, the intrastate business increases while the interstate traffic decreases. By the same token the intrastate rates jeopardize the interstate rates in that the interstate carriers must make the intrastate rates the measure of their interstate rates in order to secure part of the business.

Producers of coal in Indiana compete with producers in Illinois in shipping to Illinois points. The interstate shippers are at a greater disadvantage than before August 26, because of the relatively greater rate increases they have been called upon to bear. Producers in the northern Illinois field, however, which comprises mines located in Marshall, LaSalle, Woodford, Grundy, and Bureau counties, offered evidence to prove that the intrastate rates from their mines to points in northern Illinois were not unreasonably preferential, and that no further increase should be allowed in such rates. These rates have been subjected to relatively greater increases in recent years than have the rates from the Indiana mines. In the following table the present rates from the competing mines to Chicago are compared with the rates formerly in effect:

	Intrastate northern Illinois	Interstate from Indiana groups		
		Clinton	Linton	Princeton
In 1910	$0.50	$0.70	$0.80	$0.87
On June 24, 1918	.77	.97	1.07	1.14
At present	1.40	1.78	1.92	2.015

Since June 24, 1918, the rates from northern Illinois to Chicago have been increased 82 per cent, while the rates from the Princeton group, in Indiana, have been increased only 77 per cent. If we look to the total increases since 1910 we find that the northern Illinois rate has been increased 180 per cent and the Princeton rate 130 per cent. The percentages of increase from each producing group to Chi- [fol. 229] cago since June 24, 1920, and also since 1910 are shown below:

	Northern Illinois Per Cent	Clinton Per Cent	Linton Per Cent	Princeton Per Cent
Per cent of advance in each rate since June 24, 1918	82	83	79	77
Per cent of advance in each rate since 1910	180	154	140	130

In 1910 the rates from the northern Illinois mines to Chicago were 71 per cent of the rates from the Clinton group, but at present they are 79 per cent. The changed percentage relationships from the several groups to Chicago are shown below; that is, the northern Illinois rates were the following percentages of the Indiana rates:

	From		
	Clinton Per Cent	Linton Per Cent	Princeton Per Cent
In 1910	71	62	57
On June 24, 1918	79	72	68
At present	79	73	69

However, notwithstanding the fact that the northern Illinois mines have been subjected to greater percentage increases, the differentials between the Indiana and the Illinois mines were increased on August 26, greatly to the detriment of the Indiana mines. The following table shows the differentials against Indiana on traffic to Chicago before and after the increase:

	Clinton Cents	Linton Cents	Princeton Cents
Before	20	30	37
After	38	52	61½

The differentials, rather than the rates themselves, are the matters which concern the coal producers. All of the

above statements as to the present rates are based on a 33⅓ per cent increase within Illinois. A 35 per cent increase was later allowed and resulted in slightly modified figures. The matter of coal rates is still pending before the Illinois Commission.

Grain and grain-products rates in Illinois which before August 26 were on a parity with the interstate rates were on that date made generally 0.5 cent per 100 pounds lower than the interstate rates. These commodities are sold on [fol. 230] narrow margins of profit and small rate differences result in difficulties as between competing markets. The situation, insofar as it affects East St. Louis, Cairo, Ill., and several other markets, was made the subject of conference, and the rates to those points have, with the permission of the Illinois commission, been increased 40 per cent thus removing the cause of complaint as to them.

In our second supplemental report in Illinois Classification, 56 I. C. C., 687, we found that the adjustment of brick rates from Illinois and Indiana producing points to various destinations in Illinois was unduly prejudicial to the Indiana producers. We recommended to the Director General that, pending the outcome in Docket 10733, in which the whole situation was and still is under consideration, a rate of $1.40 per net ton be established on brick, other than common, from the Indiana and Illinois producing points to Chicago, and that rate was put into effect. On August 26, 1920, the rate from the Indiana points became $1.96, while that from the Illinois points became $1.865. This situation would be corrected by a 40 per cent increase in the Illinois intrastate rates in effect August 25, 1920.

The various rate situations hereinbefore described are cited as examples. Others of the same general character are shown by the record, and many others could be found. The contention is made by the Illinois interests that we should limit any finding of undue prejudice to the localities specifically shown to be affected. To our views upon the law of the case as expressed in our previous report herein and in Rates, Fares, and Charges of N. Y. C. R. R. Co., 59 I. C. C., 290, we may add that the instances pointed out are merely typical of a condition that is general. The rates to and from the various points on any given commodity, both state and interstate, local and joint, are closely related and interrelated, and the creation of material differences be-

tween them is subversive of established and sound economic and commercial conditions, resulting in a situation which could not reasonably be approved.

The Illinois commission points out that there are some instances where individual intrastate rates in that state, [fol. 231] even with the lesser increases allowed by it, happen to be as high as or higher than those applicable interstate for equal distances; but it is not claimed that this is true of the general body of rates. The application of lower rates intrastate in Illinois than for similar hauls interstate in the Illinois district and central territory is general, and even with increase in the amounts allowed by us in Increased Rates, 1920, and Authority to Increase Rates, supra, the intrastate rates on most of the important articles of traffic in Illinois would still be lower than the interstate rates in central territory. The differences are due in large part to the failure of the Illinois commission to grant the same increases in recent years as have been authorized by us.

Evidence was offered by the Illinois commission as to traffic density, showing that the western and southern lines have a density in Illinois much greater than the average on their entire systems and greater than the eastern lines have in Illinois. The figures for Illinois do not represent merely intrastate traffic, but all traffic that moves within, into, out of, or through the state. The traffic density on the eastern lines in Illinois is, in general, much less than on their entire systems, and the figures do not indicate to us that Illinois should have a lower basis of rates than obtains in the territory east thereof.

The Illinois commission also points out situations arising from the 40 per cent increase in the Illinois district as compared with the 35 per cent increase between Illinois and points in western territory and the 33⅓ per cent increase between Illinois and southern territory, pursuant to Increased Rates, 1920. The rate from Chicago to Davenport, involving a haul entirely within the Illinois district, takes an increase of 40 per cent, whereas from Chicago to points in Iowa just west of Davenport and in competition with it the increase has been but 35 per cent, thus lessening the rate difference that formerly existed in favor of Davenport. Rates on coal from Kentucky fields to Illinois points, involving hauls from the southern territory into the eastern

territory, were increased 33⅓ per cent, as against the increase of 40 per cent sought within Illinois. These situations are considered by that commission as justifying an [fol. 232] intermediate percentage increase intrastate in Illinois as a border state. Situations of the kind cited are, of course, general and can be found at all points along the northern, western, and southern borders of the Illinois district and in fact at any place in the country where any two of the rate groups fixed in Increased Rates, 1920, supra, adjoin. The difficulty could have been avoided only by a horizontal increase for the entire country. This was recognized in our report.

Some readjustments may be appropriate in individual instances where substantial injury results. An approval of the Illinois commission's rates would mean the approval of lower rates in Illinois, and indirectly lower rates perhaps west of the Mississippi River, than in official classification territory. Such inequalities as call for readjustment may be brought to our attention in the appropriate way and dealt with as occasion requires.

After the Illinois commission's first order was issued the Public Service Commission of Indiana rendered its report on an application for increases to the extent authorized by us. The Indiana commission declined to grant such increases and expressly indicated in its report that it was controlled by the action of the Illinois commission and by the existence of lower intrastate rates in Illinois than in Indiana. In other words, the Indiana commission felt that in justice to the citizens of Indiana it could not permit higher rates within that state than applied with the state of Illinois. It requires no stretch of the imagination to realize what would be the situation if every state in the Union would take similar action, savoring of reprisal and retaliation, thus requiring the imposition upon interstate traffic of unreasonably disproportionate increases in order to insure the prescribed return. It was just such a situation that Congress sought to prevent when it enacted the statutory provisions with which we are here concerned.

In Indianapolis Chamber of Commerce v. C. C., C. & St. L. Ry. Co., 60 I. C. C., 67, decided December 30, 1920, we found, inter alia, that the rates on cattle and hogs, in carloads, from certain points in Illinois to Indianapolis, Ind., [fol. 233] were just and reasonable, but that the relation-

ship between those rates and the intrastate rates from the same originating territory to Chicago, East St. Louis, and Peoria, Ill., subjected Indianapolis and shippers there located to undue prejudice and disadvantage, to the undue preference and advantage of the above-named Illinois destinations. To correct the maladjustment we prescribed the application to the intrastate traffic of rates on the interstate basis, and our findings and conclusions in the instant case are in harmony therewith.

Upon this record we find no conditions within Illinois so different from those affecting interstate traffic as to justify the present differences in rates. Illinois intrastate traffic is not contributing its just proportion of the revenues of the carriers, measured by the statutory rate of return "upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." The record established that the present intrastate charges for freight services and for the transportation of milk and cream by the steam railroads subject to our jurisdiction and by the Chicago, Lake Shore & South Bend Railway and the receiver of the Aurora, Elgin & Chicago Railroad on the third-rail division of that line, in Illinois, lower than the just and reasonable corresponding interstate rates and charges authorized in and established in the eastern group, including the Illinois district, pursuant to Ex Parte 74, afford intrastate traffic and shippers and localities within the state undue preference and subject interstate traffic and shippers and localities outside the state to undue prejudice, and unduly, unjustly, and unreasonably discriminate against interstate commerce.

We are of opinion and find that to remove the unlawful preference, prejudice, and discrimination found to exist, charges for freight service and rates for the transportation of milk and cream intrastate in Illinois, in effect August 25, 1920, should be increased in amounts corresponding to those authorized in Increased Rates, 1920, and Authority to Increased Rates, supra, with respect to the interstate rates and charges in the eastern group and including the Illinois district. These findings shall not, however, be construed as prohibiting the restoration or establishment of proper differentials as between coal mines in Illinois and Indiana.

[fol. 234]

An appropriate order will be entered.

Hall, Eastman and Potter, Commissioners, dissent.

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 11th day of January, A. D. 1921

No. 11703

In the Matter of Intrastate Rates within the State of Illinois

This case being a proceeding instituted by the Commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the following common carriers parties to this proceeding, namely, Alton & Southern Railroad; The Atchison, Topeka & Santa Fe Railway Company; The Aurora, Elgin & Chicago Railroad Company and J. K. Choate, receiver; The Baltimore & Ohio Chicago Terminal Railroad Company; The Baltimore & Ohio Railroad Company; The Belt Railroad Company of Chicago; Cape Girardeau Northern Railway and J. W. Fristoe, receiver; The Chesapeake & Ohio Railway Company of Indiana; The Chicago & Alton Railroad Company; Chicago, Burlington & Quincy Railroad Company; Chicago & Eastern Illinois Railroad Company and Thomas D. Head, receiver; Chicago & Erie Railroad Company; Chicago Great Western Railroad Company; Chicago & Illinois Midland Railway Company; Chicago & Illinois Western Railroad; Chicago, Indianapolis & Louisville Railway Company; Chicago Junction Railway Company; The Chicago, Lake Shore & South Bend Railway Company; Chicago, Mil- [fol. 235] waukee & Gary Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & North Western Railway Company; Chicago, Peoria & St. Louis Railroad Company; The Chicago, Rock Island & Pacific Railway Company; Chicago Short Line Railway Company; Chicago, Terre Haute & Southeastern Railway Company; Chicago & Western Indiana Railroad Company; Chicago, West Pullman & Southern Railroad Company; Chicago,

Ziegler & Gulf Railroad; Cincinnati, Indianapolis & Western Railroad Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Davenport, Rock Island & Northwestern Railway Company; Depue & Northern Railroad Company; Detroit, Grand Haven & Milwaukee Railway Company; Elgin, Joliet & Eastern Railway Company; Galesburg & Great Eastern Railroad Company; Galesburg, Rockford & Northern Railroad Company; Grand Trunk Western Railway Company; Hanover Railway Company; Illinois Central Railroad Company; Illinois Midland Railway; Illinois Northern Railway; Illinois Southern Railway Company and W. W. Wheeler, receiver; Illinois Terminal Railroad Company; Indiana Harbor Belt Railroad Company; Kankakee & Seneca Railroad Company; The Kansas & Sidell Railroad Company; The Lake Erie & Western Railroad Company; The La Salle & Bureau County Railroad Company; Litchfield & Madison Railway Company; Louisville & Nashville Railroad Company; The Macomb Industry & Littleton Railway Company; Marion & Eastern Railroad Company; The Michigan Central Railroad Company; The Minneapolis & St. Louis Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri & Illinois Bridge & Belt Railroad Company; Missouri Pacific Railroad Company; Mobile & Ohio Railroad Company; The New York Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; Paducah & Illinois Railroad Company; Palatine, Lake Zurich & Wauconda Rail Road Company; The Pennsylvania Railroad Company; Peoria & Pekin Union Railway Company; Peoria Railway Terminal Company; Pere Marquette Railway Company; The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; The [fol. 236] Pontiac, Oxford & Northern Railroad Company; Quincy, Omaha & Kansas City Railroad Company; Rock Island Southern Railroad Company; St. Louis & O'Fallon Railway Company; St. Louis Merchants Bridge Terminal Railway Company; St. Louis Southwestern Railway Company; The St. Louis, Troy & Eastern Railroad Company; Southern Railway Company; The Springfield Terminal Railway Company; Terminal Railroad Association of St. Louis; Toledo, Peoria & Western Railway Company and E. N. Armstrong, receiver; Toledo, Saginaw & Muskegon Railway Company; Toledo, St. Louis & Western Railroad

Company and W. L. Ross, receiver; The Wabash, Chester & Western Railroad Company and J. F. Gilster, receiver; and Wabash Railway Company, according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist, and to establish, put in force, and maintain rates and charges for freight services and for the transportation of milk and cream in intrastate commerce within the state of Illinois which shall exceed the rates and charges of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, now in effect, under Ex Parte 74, referred to in said report, in said carriers' rates and charges for freight services and for the transportation of milk and cream in interstate commerce within the state of Illinois and between points in the state of Illinois and points in other states in the eastern group, including the Illinois district.

It is further ordered, That this order shall become effective on or before the 7th day of March, 1921, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of this Commission in the premises.

And it is further ordered, That a copy of this order be served upon each of the above-named common carriers parties to said proceeding.

[fol. 237] Defendant's Exhibit 3 offered and received in evidence is the same as Plaintiff's Exhibit 1. It is a certified copy of the complete record before the Illinois Commerce Commission.

MOTIONS FOR FINDINGS

Defendants close their case. Motion of plaintiff for a finding in its favor. Motion of defendants to find the issues

for the defendants and also to find the defendants not guilty denied and exception.

Any objection that may have been made to the receipt in evidence of Defendant's Exhibit 1 is overruled and the exhibit is admitted in evidence and the plaintiff excepts.

Any objection that may have been made to the admission in evidence of Defendant's Exhibit 2 is overruled and the plaintiff excepts.

Plaintiff's Exhibit 7 marked for identification. It is a certified copy of the order of the Illinois Commerce Commission, Case No. 12765, entered November 7, 1923.

PLAINTIFF'S EXHIBIT 7

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

12765

ILLINOIS BRICK COMPANY

vs.

THE PENNSYLVANIA RAILROAD COMPANY and the PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY

Order

By the Commission:

The Illinois Brick Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the city of Chicago, State of Illinois, engaged in the business of [fol. 238] manufacturing and selling common brick, by complaint filed October 28, 1922, alleges:

That the rates exacted by the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company from August 26, 1920, to February 15, 1922, for the transportation of common brick from Bernice, Illinois to Chicago, Illinois, and intermediate points on the line of the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad and Pennsylvania Railroad, were

unjust, unreasonable and unjustly discriminatory and unduly prejudicial and preferential and in violation of Section- 32 and 38 of an Act entitled, "An Act to provide for the regulation of public utilities", approved June 30, 1913, in force January 1, 1914, and Sections 32 and 38 of an Act entitled "An Act concerning public utilities", approved June 29, 1921, in force July 1, 1921.

Complainant asks that the defendants and each of them may be required to make due reparation to the complainant by payment to complainant of all charges collected in excess of 40 cents per ton or such other sum as in view of the evidence adduced the Commission determines that the complainant is entitled to, together with interest at the legal rate from the date of payment of the alleged unreasonable, excessive, unjustly discriminatory and unduly prejudicial rates charged.

This complaint was filed with the Commission October 28, 1922. Section 72 of Article 5 of an Act entitled, "An Act to provide for the regulation of Public Utilities," provides:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the * * * service as to which complaint is made was furnished or performed * * *."

The Commission therefore finds that the complaint with respect to the shipments, service upon which was performed prior to October 28, 1920, be dismissed.

The plants of the Illinois Brick Company at Bernice, Illinois, compete with other brick plants located in the Chicago Switching District for business in the Chicago market. [fol. 239] The products of some of the brick plants in the Chicago Switching District undergoes no railroad transportation as their product is delivered by team or truck. The most important competition that the plants outside of the Chicago Switching District meets, appears to be with the plants at Blue Island and Riverdale.

Prior to June 25, 1918, the rate per single line hauls to points within the Chicago Switching District from the respective points below were:

Weber, Illinois, via the Chicago & North Western Railroad, Riverdale and Blue Island, via the Baltimore & Ohio Chicago Terminal Railroad, Blue Island via the Chicago Rock Island and Peoria Railroad, Blue Island via the Grand

Trunk, Dolton, via the Indiana Harbor Belt Railroad, Lansing, and Bernice via the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad, Bernice via the Pennsylvania Railroad and Chicago Heights, via the Baltimore and Ohio Chicago Terminal Transfer Railroad, 25 cents per ton of 2,000 pounds and Schmerville, Illinois, via the Chicago, Milwaukee & St. Paul Railroad, 30 cents per ton of 2,000 pounds.

On June 25, 1918, the rates for transportation of common brick to all points including those within the Chicago Switching District were increased 40 cents per ton, under General Order No. 28, issued by the Director General of Railroads. Under the rule for the disposition of fractions state in the said General order the rate of 25 cents per ton was increased to 70 cents per ton from all of the aforesaid points to destinations within the Chicago Switching District.

By freight rate authority No. 1887, issued October 19, 1918, the rate of 70 cents per ton from Weber, Illinois, via the Chicago & North Western Railroad, Riverdale via the Baltimore & Ohio Chicago Terminal Railroad, Blue Island via the Chicago, Rock Island and Pacific Railroad and Grand Trunk Railroad, and Dolton, Illinois, via the Indiana Harbor Belt Railroad was reduced to 30 cents per ton, while the rate from Lansing, Illinois, via the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad, Bernice, Illinois, via the Pittsburgh, Cincinnati, Chicago & St. Louis [fol. 240] Railroad and Pennsylvania Railroad, Chicago Heights, via the Baltimore & Ohio Chicago Terminal Railroad and Shermerville via the Chicago, Milwaukee & St. Paul Railroad remained at 70 cents per ton.

Effective August 26, 1920, the following changes were made:

Weber, Illinois, Riverdale, Illinois, Blue Island and Dolton, Illinois, 40 cents per ton.

Lansing, Bernice, and Chicago Heights, Illinois, 93½ cents per ton and Shermerville, Illinois, 90 cents per ton.

On November 15, 1920, pursuant to a general increase in all rates to 35 per cent over the rates in effect August 25, 1920, authorized by this Commission, docket 10620, the rates from the respective points via the aforesaid routes were changed as follows:

From Weber and Dolton, Illinois, no change.

From Riverdale and Blue Island, Illinois, 40½ cents per ton.

From Lansing, Bernice and Chicago Heights, Illinois, 94½ cents per ton.

From Shermerville, Illinois, 90 cents per ton.

On February 19, 1921, pursuant to the order of the Interstate Commerce Commission in Docket 11703, fixing the Illinois intrastate rates at 40 per cent over the August 25, 1920, rates, the rates from the respective points via the Aforesaid routes were made:

From Weber and Dolton, Illinois, no change.
Riverdale and Blue Island, Illinois, 42 cents per ton.
Lansing and Bernice, Illinois, 98 cents per ton.
From Shermerville, Illinois, $1.00 per ton.

On February 16, 1922, pursuant to the order of the Interstate Commerce Commission in docket 11317, the rates from the respective points via the aforesaid routes were changed to the following:

From Weber, Illinois, no change.

From Riverdale, and Blue Island, Illinois, via the Baltimore & Ohio Chicago Terminal Railroad, 50 cents per ton.

Subsequently, the Chicago, Rock Island and Pacific Railroad, effective April 25, 1922, increased its rates from Blue [fol. 241] Island to 50 cents per ton, and on March 14, 1922, the Grand Trunk Railroad increased its rate from Blue Island, Illinois, to 50 cents per ton.

It will be observed from the aforesaid history of the rates that the parity existing between the brick producing plants have been seriously disturbed and that it was not until after the Interstate Commerce Commission entered its order in docket 11317, 64 I. C. C. 273, that the parity of the rates theretofore existing, with the exception of the rate from Weber, Illinois, was restored.

The distances involved from the plants within the Chicago Switching District range from 13 to 22 miles, and from the plants outside of the Chicago Switching District, 21 to 30 miles.

The disturbance of the parity of the rates arose by reason of the Director General of Railroads ordering an increase of 40 cents per ton on all brick between all points instead of an increase of 25 per cent. It apparently was

not anticipated by the Director General of Railroads that the switching rates for the transportation of brick should be increased by 40 cents per ton as other switching rates were only increased 25 per cent. This is borne out by the fact that on October 19, 1918, the Director of Traffic of the United States Railroad Administration, authorized a reduction in the switching rates for the transportation of brick between points within the Chicago Switching District eliminating the 40 cents per ton increase and substituting therefor an increase of 25 per cent. At that time apparently no consideration was given to the relationship in the rates here considered nor to the competitive conditions under which the relationship was established.

The distance from Bernice, Illinois, to Chicago, Illinois, via the Pittsburgh, Cincinnati, Chicago & St. Louis Railroa and via the Pennsylvania Railroad is 23 miles, while the distances between points within the Chicago Switching District with which the rate from Lansing, Illinois, has been compared range from 13 to 22 miles.

The defendants in their effort to justify the rates at- [fol. 242] tacked introduced a cost study. Making all due allowances for the disputed items of cost, it is clear that the rate of 30 cents per ton does not produce sufficient revenue to pay operating expenses. It is also clear from the cost study that the rate of 50 cents per ton for single line application at the time the shipments, here under consideration, moved provides adequate revenue for the transportation of brick from Bernice, Illinois, to points of destination within the Chicago Switching District and intermediate points covered by this complaint.

We find that to the extent that the rates here complained of exceed by more than 10 cents per ton the rates contemporaneously applied between points within the Chicago Switching District, the rates from Lansing, Illinois, were unjustly discriminatory.

Giving due consideration to the development of all of the rates from all brick producing plants within the Chicago Switching District and points immediately beyond the said Switching District, the services performed and the conditions under which such services were performed we find that the complainant has been damaged to the extent that the charges assessed are greater than the charges that would have been assessed had the said charges been

predicated on a rate of 50 cents per ton, minimum 60,000 pounds per car.

The Commission will accordingly reserve jurisdiction of the subject matter and of the parties for the purpose of determining the amount of reparation due under the findings of the Commission expressed herein.

It is therefore ordered that the Pittsburgh, Cincinnati Chicago & St. Louis Railroad Company and the Pennsylvania Railroad Company, be, and they are hereby severally directed to file with the Commission within sixty days of the date of this order, a statement showing car number and initial, date of shipment, date of delivery, point of origins, destination, rate charged, charges assessed, and rate and charges that would have been assessed and amount of reparation due under the findings of the Commission expressed herein.

It is further ordered that the Commission reserves juris- [fol. 243] diction of the subject matter and of the parties herein for the purpose of entering an order awarding reparation for charges collected in excess of the rates found to be free from discrimination under the findings of the Commission expressed herein.

By order of the Commission, at Springfield, Illinois, this 7th day of November, 1923.

(Signed) Julius Johnson, Secretary.

Plaintiff's Exhibit 8 marked for identification. It is a certified copy of the order of the Illinois Commerce Commission, Case No. 12765, entered April 16, 1924.

PLAINTIFF'S EXHIBIT 8

STATE OF ILLINOIS:

ILLINOIS COMMERCE COMMISSION

1st Supplement. 12765

ILLINOIS BRICK CO.

vs.

PENNSYLVANIA RAILROAD COMPANY and the PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY

Order

By the Commission:

It appearing that on November 7th, 1923, the Commission entered its report, findings and order in the above entitled proceeding which is hereby referred to and made a part hereof, under which order the Commission reserved jurisdiction of the subject matter and of the parties for the purpose of entering an order awarding reparation for charges collected in excess of the rates found to be just and reasonable in said order, and

It further appearing that this proceeding now comes on for further consideration on the question of reparation. A statement certified to by the Auditor of the Pennsylvania Railroad Company showing amount of reparation [fol. 244] due under the aforesaid order and findings of the Commission entered November 7, 1923, has been filed which shows the amount of reparation due to be $28,965.72. The amount of reparation due is stipulated to be the amount due under the aforesaid order and findings of the Commission in the said order of November 7th, 1923, and we accordingly find that the complainant is entitled to an award of reparations in the amount of $28,965.72 and interest at the legal rate from the date of payment for excessive freight charges collected on shipments transported by the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (now Pennsylvania Railroad Company), from Bernice, Illinois, to points within the Chicago Switching District, during the period October 28, 1920, to February 15, 1922.

It is therefore ordered, That the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (now Pennsylvania Railroad Company), be, and they are hereby authorized and directed to pay to the complainant on or before May 1st, 1924, $28,965.72 and interest thereon at the legal rate from date of payment as reparation on account of unreasonable rates charged and charges exacted for the transportation of common brick between the aforesaid points in accordance with the findings expressed in the order of November 7th, 1923, Docket 12765 and the order and findings expressed herein.

By order of the Commission at Springfield, Illinois, this 16th day of April, 1924.

(Signed) Julius Johnson, Secretary. (Seal.)

Defendant's objection to the receipt of Plaintiff's Exhibits 7 and 8 in evidence sustained and the palintiff excepts.

The Court: There are several matters with reference to the evidence that I reserved a ruling on. There is the testimony, I think, of this gentleman here, Allison is his name, with reference generally to the manner in which they did business in Chicago, or some testimony. The ob-
[fol. 245] jection to that testimony, as it was made, and in each instance, the court reserved a ruling, objection will be sustained. Plaintiff excepts.

Now, I am ready to decide this and if I was to decide it, I would decide it for the plaintiff except one thing. The only thing that I have in mind is what is here that warrants a judgment against the Pennsylvania Railroad? In the last order it says that the P. C. C. & St. L. Railroad, now Pennsylvania Company. There is no testimony anywhere, not in the abstract or record, that justifies that that is now the Pennsylvania Company. I want to know by what authority I can enter a judgment against the Pennsylvania Railroad Company, the Pennsylvania Company, Pennsylvania Railroad Company. Your declaration is against both of them, the Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company. How can I enter a judgment against both of these for one amount, when the testimony shows that one owes so much

and one owes so much, and one owes very much more than the other?

Mr. Miller, attorney for plaintiff: Your Honor can enter a judgment against each of them for the respective amounts.

The Court: There is no testimony as to what the respective amounts are.

Mr. Miller: The record shows that.

The Court: I know the record shows that.

Mr. Miller: The award shows it.

The Court: Let me see if your declaration shows it. That is the only thing that I have in my mind. If I can clear that up—supposing you look at it. This is the declaration as amended, and you can take a few minutes and go ahead and look at it.

[fol. 246] Mr. Miller: We have asked for $28,000 from each of them. Now, if the evidence that is brought in, the record that is brought in here, is not sufficient to sustain a judgment for $28,000 against each, it is still sufficient to sustain a judgment for whatever the evidence does show. For instance, in a case if I sue two defendants for $1,000 and my evidence proves they are not liable for a thousand but one is liable for ten and one for twenty dollars, that is merely a matter of evidence. That is the reason I introduced the record in evidence. Your Honor thought I did not have to introduce it.

The Court: I did not think anything. I said both sides introduced the record. I had occasion to go over it. That is the only question in my mind. Supposing counsel raises that point, and supposing you go into it.

Mr. Miller: Simply the situation is this, your Honor. After this proceeding before the Commission was instituted, it now develops, I discover that the Pennsylvania Railroad and the Pan Handle went in before the Interstate Commerce Commission on a petition and had a hearing before the Interstate Commerce Commission in 1922, on application under the Interstate Commerce Act for leave by the Pennsylvania Railroad to lease for ninety-nine years the entire trackage of the Pan Handle. There was a hearing on it and the decision was rendered.

After the decision was rendered, according to the requirements, the Pennsylvania Railroad Company then filed with the Illinois Commerce Commission its report setting

forth that the Pennsylvania Company was now running the Pan Handle.

The Interstate Commerce Commission when it decided this case, had that report of the Pennsylvania Railroad [fol. 247] before it, although it had not been in the case. So that the Commission finds in the order that the Pennsylvania Railroad Company and the Pan Handle Company are now the Pennsylvania Railroad Company.

I now desire at this time to introduce in evidence certified copies of the order of the Interstate Commerce Commission and a certified copy of the report or a part of the report of the Illinois Commerce Commission showing these facts. I ask that these be marked Plaintiff's Exhibits A and B of this date.

(Defendant's objection to said exhibits overruled.)

Plaintiff's Exhibit A of December 2, 1933, offered and received in evidence was a certified copy of a statement appearing on page 522 of the Annual Report of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, for the year ended December 31, 1922, on file with the Illinois Commerce Commission and was as follows:

PLAINTIFF'S EXHIBIT "A"

"Under date of July 10, 1922, the Interstate Commerce Commission approved the lease of this company's property to the Pennsylvania Railroad Company for a term of 999 years from January 1, 1921; the accounting for the year 1921 was adjusted to the basis of the terms of the lease."

Plaintiff's Exhibit B of December 2, 1933, offered and received in evidence was a certified copy of a report and order of the Interstate Commerce Commission filed and entered July 10, 1922, and an order of the Interstate Commerce Commission entered October 2, 1923, in Finance Docket No. 1466 pertaining to the lease of the Pan Handle by Pennsylvania R. R., and was as follows:

[fol. 248] PLAINTIFF'S EXHIBIT "B"

Interstate Commerce Commission

Finance Docket No. 1466

Lease of Pan Handle by Pennsylvania R. R.

In the Matter of the Application of the PENNSYLVANIA RAILROAD COMPANY for Authority to Acquire Control, by Lease, of the Railroad and Leased Lines of the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company.

Washington, Government Printing Office

1922

Finance Docket No. 1466

Lease of Pan Handle by Pennsylvania R. R.

In the Matter of the Application of the PENNSYLVANIA RAILROAD COMPANY for Authority to Acquire Control, by Lease, of the Railroad and Leased Lines of the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company.

Submitted February 3, 1922. Decided July 10, 1922

Acquisition by Pennsylvania Railroad Company of control of the railroad and leased lines of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, by lease, conditionally approved and authorized.

C. B. Hesierman and F. D. McKenney for application.

Alfred A. Cook, Thomas R. White, and Frederick F. Greenman for Continental Insurance Company, intervener.

William L. Marbury for L. Kemp Duval, intervener.

Report of the Commission

By the Commission:

The Pennsylvania Railroad Company, a common carrier by railroad subject to the interstate commerce act, hereinafter called the Pennsylvania, on June 2, 1921, filed an

application, pursuant to paragraph (2) of section 5 of the interstate commerce act, for an order authorizing it to acquire control, by lease, of the railroad and leased lines of the Pittsburgh, Cincinnati, Chicago & St. Louis Rail-[fol. 249] road Company, a common carrier by railroad subject to the interstate commerce act, hereinafter called the Pan Handle, for the term of 999 years from January 1, 1921. Hearings were held upon this application on September 27 and December 13, 1921. No representations were made by any State authority either in favor of or against the granting of the application. The application was made the subject of a tentative report by an examiner, to which report exceptions were filed by interveners, and the case was argued orally by the parties.

At the first hearing the Continental Insurance Company, hereinafter called the Continental Company, filed an intervening petition asking that the application be denied on the ground that the proposed lease is unfair and unjust to the independent stockholders of the Pan Handle, or "in the event that the Commission deems it in the public interest that such lease be authorized, then that such authorization shall be upon the condition that the Pennsylvania Railroad Company pay an adequate and just consideration, equal to a dividend of 6¾ per cent upon the outstanding stock of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, and that the terms of the lease shall secure to such stockholders a return in that amount."

At the second hearing it was contended in behalf of L. Kemp Duval, an intervening minority stockholder owning 1,225 shares of the capital stock of the Pan Handle, that not only should the past earnings for a period of not less than 10 years be considered, but that in determining what those earnings were, we can not accept the earnings credited to the Pan Handle by the board of directors or other officials of that company as being true earnings, but that we should, through our own examiners, make an investigation and ascertain what the true earnings were.

The Pan Handle was organized January 1, 1917, as a consolidation of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the Vandalia Railroad Company, the Pittsburgh, Wheeling & Kentucky Railroad Company, the Anderson Belt Railway Company, and the Chicago, Indiana & Eastern Railway Company. Its railroad extends

[fol. 250] from Pittsburgh, Pa., to Cincinnati, Ohio, Chicago, Ill., Louisville, Ky., and St. Louis, Mo., and serves many cities of importance in the intervening territory. It operates 2,265.61 miles of first main track, of which 1,855.38 miles are owned by it and 410.23 miles are leased.

By the terms of the proposed lease, the Pan Handle demises to the Pennsylvania all the railroads owned and operated by it, and assigns to the Pennsylvania the leases which it holds of the Little Miami Railroad, extending from Cincinnati, Ohio, to Columbus, Ohio, and Richmond, Ind., the Terre Haute & Peoria Railroad, extending from Farmdale, Ill., to Maroa, Ill., and from Decatur Junction, Ill., to the Indiana State line near Farrington, Ill., and that portion of the Evansville & Terre Haute Railroad extending from Terre Haute, Ind., to Rockville, Ind. By the terms of the lease the Pennsylvania proposes to pay to the Pan Handle, as rental (a) a sum equivalent to 4 per cent per annum on the Pan Handle's now outstanding capital stock until December 31, 1925, and 5 per cent per annum thereafter, without deduction for any taxes other than an income tax on the stockholder levied by the Government of the United States; also a sum equivalent to such percentage on any additional capital stock that may with the approval of the lessee be issued by the lessor after January 1, 1921, as shall have been agreed upon by the lessor and the lessee at or prior to the date of the issuance thereof. The lease provides that it is—the true intent and meaning of these presents that the said sum shall at all times hereafter be and remain applicable to and be applied and disbursed by the lessor as a dividend fund for its stockholders, when and as from time to time received as herein provided, without any deduction or abatement on account of any such taxes, and that every such tax shall be paid by the lessee in addition thereto, except as income tax on the stockholder levied by the Government of the United States above referred to.

(b) A further sum sufficient to enable the Pan Handle to maintain its corporate organization and to pay all taxes and assessments and all installments of interest and sinking funds on its bonded and other indebtedness, when due [fol. 251] and payable, and all taxes in respect of such bonded or other indebtedness.

The Pennsylvania further agrees to pay all rentals accruing under the leases of the Little Miami Railroad and the Terre Haute & Peoria Railroad, hereinabove referred to, and all sums to become due under any contracts for trackage or other rights conferred upon or possessed by the Pan Handle. The lease further provides that the Pennsylvania may and will make all such improvements, betterments, and additions to the demised premises as shall in its judgment be necessary, and that the cost thereof shall be repaid to it by the Pan Handle, either in money, or by the issue and delivery to it of bonds of the Pan Handle, or of its capital stock, as the Pennsylvania shall elect. Upon the maturity of any of its bonds during the term of the lease, the Pan Handle, if unable to pay them, agrees to provide for their extension, or to issue and deliver to the Pennsylvania other bonds to provide for such payment.

On March 15, 1920, the Pennsylvania Company, a corporation whose entire capital stock is held by the Pennsylvania, owned 651,245 shares of the capital stock of the Pan Handle and the Pennsylvania owned 4,500 shares. These holdings aggregated 77.54 per cent of the entire capital stock. The remainder of the stock, amounting to 189,908 shares, was held by outside stockholders.

For many years the Pennsylvania Company and the Pennsylvania have been the financial backers of the Pan Handle and its predecessor companies. Either one or the other of these two companies has guaranteed all the outstanding bonds of the Pan Handle and has advanced funds from time to time to enable it to enlarge and improve its property, to provide equipment, and to sustain its credit. On March 15, 1920, the Pan Handle was indebted to the Pennsylvania Company for advances to an amount approximating $22,000,000, and thereafter issued and delivered to the Pennsylvania Company $20,000,000 of its 5 per cent 50-year bonds to discharge this indebtedness. Thereupon the Pennsylvania Company offered to purchase the outstanding minority stock of the Pan Handle by paying to the hold-[fol. 252] ers thereof, par for part, 50-year 5 per cent bonds of the Pan Handle, guaranteed, principal and interest, by the Pennsylvania. This offer was accepted by the holders of 174,791 shares. There remain outstanding 15,117 shares of minority stock, comprising 1.7 per cent of the total issue, of which the Continental Company owns 2,000 shares. The

shares held by the Continental Company were the only shares that voted against the approval of the proposed lease.

For many years, the Pan Handle and the Pennsylvania have worked in close cooperation and have interchanged and moved traffic as one transportation system. It is stated by the applicant that the proposed lease will enable it to operate the railroad of the Pan Handle as a part of its system, which will eliminate much of the separate accounting now necessary. It is expected that economies in operation will be effected through a better alignment of operating divisions and the reduction of overhead expenses. It should also simplify the work of preparing reports required by Federal and State regulatory bodies.

At the close of the year 1920, the Pan Handle had an authorized capital stock of $100,000,000, of which $84,701,957.50 was issued and outstanding. In addition thereto there was a stock liability for conversion amounting to $158,153.58. Its authorized funded debt, including equipment obligations, amounted to $140,471,818, of which $106,467,512 was outstanding. The road-and-equipment account showed an investment of $260,750,063.55, and the profit-and-loss credit balance amounted to $4,558,261.44. The Continental Company states that the physical value of the Pan Handle property, as indicated by the engineering and land reports of our Bureau of Valuation as of June 30, 1916, plus the net charges to road and equipment accounts from that dated to December 31, 1920, amount to the sum of $22,722,834. No complete tentative valuation of the property has been made by us.

The interveners do not contend that the proposed lease would not be advantageous to the railroad companies involved nor that it would not effect economies beneficial to [fol. 253] the public. They do contend, however, that the net income of the Pan Handle for the years 1908 to 1917, inclusive, before deducting payments required to be made to sinking funds, averaged 6.75 per cent on its outstanding capital stock. They contend further that the principal factor in determining the value of the capital stock of a railroad company is the prospect of future earnings of the company, and that the circumstance that the stock of the Pan Handle is virtually guaranteed by the Pennsylvania should not be given any appreciable weight in determining

its value. For obvious reasons, the earnings for the period 1908 to 1917 can not be taken as an index of future earnings. A vice president of the Pennsylvania testified that in his opinion there was no hope that the Pan Handle would earn a return equal to 4 per cent on its capital stock during the next five years, even with all economies that might be effected. As to the value of the guaranty, it is common knowledge that in many cases a guaranteed stock may sell on an interest basis comparable to that of bonds. Furthermore, in comparing the value of a rental with a return through dividends, it must be taken into consideration that dividends are not ordinarily measured by net income, but are usually and properly much less.

The interveners contend further that the lease does not expressly provide for the guaranteed dividend; that in this respect it is subject to interpretation; and that the provision in question may very well be held not to be one which can be taken advantage of by the stockholders of the Pan Handle. The vice president of the Pennsylvania testified that it was his understanding that under a fair construction of the lease it is obligatory upon the Pan Handle to disburse as dividends to its stockholders the rental payments of 4 per cent per annum on its capital stock for the first five years and 5 per cent per annum thereafter. The interveners contend also that inasmuch as the Pennsylvania is the majority stockholder of the Pan Handle, has elected its directors, and has controlled the company and operated its property for many years, the two corporations can not be said to be dealing at arm's length, but that the Penn- [fol. 254] sylvania occupies with respect to the transaction a fiduciary relation to the Pan Handle and to its dissenting stockholders.

We do not consider it necessary to discuss our responsibility in protecting the interests of minority stockholders who may object to proposed action on the part of a carrier corporation, inasmuch as it is our view that the granting of the authority herein requested will not be inimical to the interests of any of the interested stockholders;

As heretofore stated, approximately 98 per cent of the Pan Handle stock is owned by the Pennsylvania and the Pennsylvania Company. It is obvious that so long as that situation continues, the payment of the rentals reserved

in the lease will be merely a matter of bookkeeping as regards the 98 per cent of the stock which is so owned. If the Pennsylvania were to dispose of the stock which it and the Pennsylvania Company now hold, an entirely different situation would be presented and one which might very well be said to be against the public interest. Such a sale of stock would separate the responsibility in operating the property under the lease from the proprietorship in the property which is now vested in the lessee. The Pennsylvania contends that we have no power to guard against such an occurrence by means of a condition attached to our authorization which would prevent the Pennsylvania from disposing of the stock without our consent, its position being that the conditions referred to in paragraph (2) of section 5 of the act are the conditions of the lease itself, and that the language does not cover a condition subsequent which is unrelated to the subject matter of the transaction.

We are unable to accept this construction of the law. In considering the propriety of proposed action for which our authority is sought, it is plainly our duty to take into consideration all surrounding circumstances that have a bearing upon the interest of the public in the things sought to be done. It follows, in our opinion, that where the authorization depends for its justification upon certain existing circumstances, the authority given may be conditioned upon a continuance of the controlling circumstances, and proper provisions may be made to insure such continuance, or [fols. 255-263] the substitution of circumstances as satisfactory from the standpoint of the public interest. Chicago Junction Case, 71 I. C. C., —. In this case, we regard the relationship between lessor and lessee as essential to our approval of the proposed arrangements, and such approval will be given upon condition that the Pennsylvania Company and the Pennsylvania Railroad Company shall not dispose of their stock in the Pan Handle without our consent. Subject to the aforesaid condition, we find that the acquisition by the Pennsylvania of control of the railroad and leased lines of the Pan Handle under the terms of the lease described in the application will be in the public interest.

An order will be entered accordingly.

Potter, Commissioner, concurring opinion.
Hall, Commissioner, dissenting opinion.

Daniels, Commissioner, dissenting opinion.
Eastman, Commissioner, dissenting opinion.
Campbell, Commissioner, dissenting opinion.

[fol. 264] Order

A hearing in this proceeding and investigation of the matters and things involved therein having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, authorized to acquire control of the railroad and leased lines of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company in accordance with the terms of the lease described in the application and the report aforesaid: Provided, however, that the authorization herein given is upon the express condition that the Pennsylvania Company and the Pennsylvania Railroad Company shall not hereafter sell, pledge, or otherwise dispose of the capital stock of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, now owned or controlled by them, or either of them, or any part thereof, without the consent of this commission.

By the commission. George B. McGinty, Secretary.
(Seal.)

[fol. 265] Interstate Commerce Commission

Finance Docket No. 1466

Lease of Pan Handle by Pennsylvania R. R.

In the Matter of the Application of the Pennsylvania Railroad Company for Authority to Acquire Control, by Lease, of the Railroad and Leased Lines of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company

Approved October 2, 1932

Amendatory Order

Upon further consideration and for good cause shown:

It is ordered, that the commission's order herein entered July 10, 1922, be, and the same is hereby, amended and modified to read as follows:

It is ordered, that the Pennsylvania Railroad Company be, and it is hereby, authorized to acquire control of the railroad and leased lines of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, in accordance with the terms of the lease described in the application and the report aforesaid: Provided, however, that the authorization herein given is upon the express condition that the Pennsylvania Company and the Pennsylvania Railroad Company shall not, except in connection with transactions with the Federal Government, hereafter sell, pledge, or otherwise dispose of the capital stock of the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company now owned or controlled by them, or either of them, or any part thereof, without the consent of this commission.

It is further ordered, that, except as herein amended and modified, the said order of July 10, 1922, shall remain in full force and effect.

By the commission.

George B. McGinty, Secretary. (Seal.)

Defendants make the further objection that Plaintiff's Exhibits A and B are not the best evidence. Said objec- [fol. 266] tions overruled and defendants except. The motion of defendants jointly and severally to find the issues for defendants and also to find the defendants not guilty. Denied and defendants except.

MOTION TO DISMISS

Plaintiff moves the court to dismiss Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company and the motion is allowed.

MOTION FOR FINDING

Motion of plaintiff for a finding for the plaintiff against the Pennsylvania Railroad Company in the amount of $28,673.02 plus interest thereon amounting to $16,530.54 or a total of $45,203.56 plus reasonable attorney's fees to be fixed by this court.

The Court: How do you arrive at that figure, the principal, the original figure?

Mr. Miller: We have taken all the shipments over the Pennsylvania Railroad and all the shipments over the—what was the Pan Handle, but which became the Pennsylvania Railroad Company, from January 1, 1921.

The Court: In other words, you have taken this paper and eliminated from that all of the shipments prior to January 1, 1921, over the Pan Handle?

Mr. Miller: Correct.

The Court: And what is the total?

Mr. Miller: $45,203.56.

The Court: What is the total of the principal?

Mr. Miller: $28,673.02.

The Court: And eliminating what?

Mr. Miller: That eliminates two hundred——

The Court: What is the total judgment of the Commission?

Mr. Miller: The judgment was $28,965.72. We have eliminated $292.70.

The Court: That leaves $28,673.02.

[fol. 267] Mr. Miller: Yes, sir. The order of the Commission required the payment of interest from the date of the payments.

The Court: Have you computed this interest?

Mr. Miller: I have computed the interest.

The Court: At what rate?

Mr. Miller: At five per cent.

The Court: That was then the statute. It is now six.

Mr. Miller: I am willing to take five.

The Court: All right.

Mr. Miller: $16,530.54 is interest.

The Court: Of course, as to the computation of the interest, there is no evidence, but is there any question as to the interest on $28,673.02 at five per cent from what date?

Mr. Miller: From the date of the shipments, we computed each item from the date of the shipment. It took a week about.

The Court: I won't allow that.

Mr. Miller: All right.

The Court: I will allow you interest at five per cent from the date of the final award or finding by the Illinois Commerce Commission at five per cent.

Mr. Miller: That will be May 1, 1924. We will compute that interest.

The Court: Compute it now on $28,673.02 at five per cent. You may take your objection and exception to the ruling of the court in not permitting you to have interest from the date of the shipments.

Mr. Miller: I get $13,858,61.

Findings of Court

The Court: I am going to find the issues for the plaintiff and I am finding that on the evidence there was due the plaintiff from the defendant, Pennsylvania Railroad Company, on May 1, 1924, the sum of $28,673.02; that the plain-
[fol. 268] tiff is entitled to interest on that amount at the rate of five per cent from May 1, 1924, to the present date, which interest amounts to $13,858.61, making the total due to the plaintiff $42,531.63.

(To which action the defendant excepted.)

The Court: I am making further finding there is due to the plaintiff under the statute from the defendant the sum of $2,000 as reasonable attorney's fees, making a total due to the plaintiff from the defendant of $44,531.63.

(To which action the defendant excepted. Defendant's motion in arrest of judgment overruled and exception.)

Judgment

The Court: Judgment on the finding for the plaintiff, Illinois Brick Company, a corporation, against the defendant, Pennsylvania Railroad Company, a corporation, of $44,531.63, and defendant excepts.

Order Allowing Appeal

Defendant prays an appeal to the Supreme Court of Illinois which is allowed upon the filing of an appeal bond in the sum of $50,000 within ninety days and plaintiff excepts. On motion of defendant the court allowed defendant ninety days within which to file a bill of exceptions.

Mr. Burke: Your Honor understands there are three cases here and this applies to all.

The Court: Let the record show that in this proceeding there have been consolidated the case entitled Illinois Brick Company vs. Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, Circuit Court of Cook County, Illinois, No. B-116212, the case entitled Illinois Brick Company vs. Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago [fol. 269] & St. Louis Railroad Company, Circuit Court of Cook County, Illinois, No. B-118056, and the case entitled Illinois Brick Company vs. Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, Circuit Court of Cook County, Illinois, No. B-119310. The order of the court applies to the consolidated cases.

The Court: Gentlemen, would it be well, after you have heard what the court has to say in this matter, that you enter a draft order in this suit? If you do that, prepare your draft order and bring it in Tuesday. How will that be? You have heard what the court intimated would be the finding and that is what I will do. Both of you said it is going to the Supreme Court, and because of that you ought to have a draft order.

Draft order entitled In the Consolidated Cases whereby plaintiff dismisses the defendant, Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, and enters a finding and judgment in favor of the plaintiff and against the defendant for $42,428.09 and costs including said sum of $2,000 as plaintiff's attorney's fees and defendant excepts and prays an appeal therefrom to the Supreme Court of Illinois, which is allowed upon the filing of an appeal bond of $50,000 in ninety days and ninety days is allowed defendant for bill of exceptions.

Signature and seal of the judge to the bill of exceptions, dated December 30, 1933.

Stipulation that the clerk may use the original bill of exceptions in preparing a transcript of the record for use on an appeal or writ of error to any court of review. Appeal bond of defendant in the sum of $50,000, filed December 30, 1933, Fidelity & Deposit Company of Maryland as

[fol. 270] surety. Order of court entered December 30, 1933, approving appeal bond.

Certificate of the Clerk of the Circuit Court of Cook County, Illinois, dated January 3, 1934, that the above and foregoing is a true, perfect and complete transcript of the record, excepting the bill of exceptions, the original of which is incorporated herein by stipulation.

ASSIGNMENT OF ERRORS

Now comes the Pennsylvania Railroad Company, a corporation, appellant in the above entitled cause, by Loesch, Scofield, Loesch and Burke, its attorneys, and says that in the proceedings, pleadings, findings and judgments disclosed by the record hereinbefore set forth, there is manifest error in this:

(1) The finding, judgment, and orders of the court below imposed an unlawful burden on interstate commerce in violation of Section 8, Article I, of the Constitution of the United States.

(2) The finding, judgment, and orders of the court below deprived appellant of property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(3) The finding, judgment, and orders of the court below denied the appellant the equal protection of the laws in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(4) The finding, judgment, and orders of the court below deprived the appellant of property without due process of law in violation of Section 2, Article II of the Constitution of the State of Illinois.

[fol. 271] (5) The finding, judgment, and orders of the court below deprived appellant of its right under Section 8 of Article I of the Constitution of the United States, and Section 1 of the 14th Amendment to the Constitution of the United States.

(6) The finding, judgment, and orders of the court below deprived appellant of its rights under Section 2 of Article II of the Constitution of Illinois.

(7) The Interstate Commerce Commission having assumed jurisdiction of and established the rate for the transportation of common brick in carloads from Bernice, Illinois, to points within the Chicago switching district in the State of Illinois, the said action established a lawful rate for the said transportation service and the action of the Illinois Commerce Commission awarding reparation based on a different rate, was unlawful and void and the action of the court below, in its orders, finding and judgment, which in effect approved the said action of the Illinois Commerce Commission, was error.

(8) The action of the appellee in applying to the Interstate Commerce Commission for reparation of and on certain freight charges paid for the transportation of common brick from Bernice, Illinois, to points within the Chicago switching district, in the State of Illinois, and the Interstate Commerce Commission having denied said application, the appellee was and is estopped in law from thereafter applying to the Illinois Commerce Commission for reparation of and on the same freight charges and the action of the Illinois Commerce Commission in awarding reparation on such application and the action of the court below in its orders, finding, and judgment in effect approv- [fol. 272] ing such action of the Illinois Commerce Commission, was error.

(9) The Illinois Commerce Commission did not have jurisdiction or power to award reparation when to do so it was required to change or reduce a rate previously approved by it and the court below erred in entering its orders, finding and judgment which in effect approved such action of the Illinois Commerce Commission.

(10) The Illinois Commerce Commission exceeded its statutory powers when it attempted to award reparation of and on freight charges based on a rate which it had previously approved and the action of the court below in entering its orders, finding and judgment, approving such action of the Illinois Commerce Commission, was error.

(11) The evidence in the record before the Illinois Commerce Commission did not warrant the findings of ultimate fact of the Illinois Commerce Commission and the action of the court below in effect finding that it did, was error.

(12) The findings of ultimate fact made by the Illinois Commerce Commission did not support the conclusions in its orders in this case and the action of the court below in effect finding that they did, was error.

(13) The record before the Illinois Commerce Commission is entirely barren of any proof of damages to support the order or orders of the Illinois Commerce Commission directing the payment of reparation and the action of the trial court in effect approving said orders without any proof whatever of damages in the record, was error.

(14) The findings and the conclusions based thereon in [fol. 273] the order of the Illinois Commerce Commission dated November 7, 1923, cannot be availed of to support the order of the Illinois Commerce Commission dated April 16, 1924, and the court below was in error when it entered its orders, finding, and judgment in effect holding that they could.

(15) If the plaintiff in the court below must rely on the order of the Illinois Commerce Commission dated November 7, 1923, it did not file its suit in the court below within the time prescribed by statute and the time for filing being an element of the cause of action, the orders, finding and judgment of the court below based on such a record before the Illinois Commerce Commission, are erroneous.

(16) The suit in the court below was not filed within one year, the time prescribed by the statute and the time for filing such suit being an element of the cause of action and not a statute of limitation, the court below erred in entering its orders, finding and judgment.

(17) The plaintiff in the court below pleaded in its declaration only the order of the Illinois Commerce Commission dated April 16, 1924, and that order contained no finding of fact whatever that could possibly support an order directing defendant to pay to plaintiff money and the action of the court below in entering judgment based on such a declaration and such an order, was error.

(18) The cause of action contemplated by the statute authorizing an action based on an order of reparation of the Illinois Commerce Commission is assumpsit and plain-

tiff in the court below having sued two defendants, it is not at liberty to dismiss one, after the conclusion of the trial, [fol. 274] and to have judgment against the other, and the action of the trial court in so doing, was error.

(19) The order or orders of the Illinois Commerce Commission upon which the action in the court below was based, directed the Pennsylvania Railroad Company to pay to the Illinois Brick Company, money. All three of the suits, which were consolidated, were against the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company. The action of the court below in overruling the motion of the defendant in the court below in arrest of judgment, was error.

(20) The court below erred in its application of the law.

(21) The court below erred in admitting incompetent evidence offered by plaintiff in the court below.

(22) The court below erred in finding the issues for plaintiff in the court below.

(23) The court below erred in finding the defendant below guilty.

(24) The orders, finding and judgment of the court below are against the manifest weight of the evidence.

(25) The orders, finding and judgment of the court below, are not supported by the evidence.

(26) The court below erred in entering judgment on the findings in the court below.

(27) The court below erred in overruling a motion of the defendant in the court below in arrest of judgment.

(28) The court below erred in not entering a finding and [fols. 275-280] judgment for the defendant in the court below.

(29) There is no competent evidence in the record to support the finding of the court concerning attorneys' fees.

Wherefore, and for other errors apparent on the face of the record and proceedings, this appellant prays that the orders, finding and judgment of the trial court be reversed and said cause not remanded; or in the event that said

prayer be denied, that the said orders, finding and judgment of the trial court be reversed, and the cause remanded for a new trial; and for such other and further order and judgment herein, as to law and justice may appertain.

Loesch, Scofield, Loesch & Burke, Attorneys for Appellant.

[fol. 281] In Appellate Court of Illinois, First District, June Term, A. D. 1934

Illinois Brick Company, a Corporation, Appellee,

vs.

Pennsylvania Railroad Company, a Corporation, Appellant

Appeal from Circuit Court, Cook County

Honorable John Prystalski, Judge Presiding

Additional Abstract of Record

Defendant's Exhibit 1 received in evidence was a certified copy of the order of the Illinois Commerce Commission dated August 10, 1920, in case No. 10620. (Original abstract pages 210-217.)

Attached to the foregoing order of the Illinois Commerce Commission is a copy of the report of the Interstate Commerce Commision in ex parte 74, "In the matter of the applications of carriers in official, southern, and western classification territories for authority to increase rates", submitted July 6, 1920, decided July 29, 1920.

Appearances of numerous carriers, associations of carriers, shippers, and associations of shippers set forth.

[fol. 282] The Interstate Commerce Commission stated in its report that in that proceeding the carriers by railroad subject to its jurisdiction sought authority, pursuant to the provisions of section 15a of the interstate commerce act to increase their freight revenues to a basis that will enable them to earn an aggregate annual net railway operating income equal as nearly as may be to 6 per cent upon the value of property used in transportation.

The applications were filed in the latter part of April and early part of May, 1920, at the suggestion of the Commission to assist it in complying with the provisions of that section. The state commissions were invited to co-operate, and members of the Public Service Commission of Pennsylvania, the Railroad Commission of Florida, and the Railroad Commission of Iowa were appointed as representatives of the state commissions and sat with the Interstate Commerce Commission throughout the hearings.

The Commission further stated that for reasons which it set forth the railroads should be grouped for rate making as follows:

Eastern Group.

Its limits for the purposes of this proceeding may be established as follows: The Atlantic seaboard from the Canadian border to Norfolk, Va., the main line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va., the main line of the Chesapeake & Ohio Railway from Kenova, W. Va., to Cincinnati, Ohio, the Ohio River to Cairo, Ill., the Mississippi River to the mouth of the Illinois River, at or near Grafton, Ill., the Illinois River from Grafton, Ill., to Pekin, Ill., a line south and east of the Atchison, Topeka & Santa Fe Railway from Pekin, Ill., through Joliet and [fol. 283] Streator, Ill., to Chicago, Ill., a line drawn from Chicago, Ill., to include the southern peninsula of Michigan, and thence following the international boundary to the Atlantic seaboard; including that portion of the Virginian Railway extending south of the southern boundary, and excluding those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile & Ohio Railroad, Atlantic Coast Line Railroad, and Seaboard Air Line extending north of the southern boundary.

Southern Group

The territory commonly known as the southern classification territory, embracing that section of the United States lying west of the Atlantic Ocean, south of the main line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va., thence south of the Chesapeake & Ohio Railway to Cincinnati, and thence south of the Ohio River to Cairo, Ill., thence east of the Mississippi River to New Orleans,

La., and the mouth of the Mississippi River; and north of the Gulf of Mexico from the Mississippi River to the Atlantic Ocean; including also those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile & Ohio Railroad, Atlantic Coast Line Railroad, and Seaboard Air Line Railway extending north of the northern boundary and excluding that portion of the Virginian Railway extending south of the northern boundary.

Western Group

The territory lying west of the western boundaries of the eastern and southern groups as above described; south of Lake Superior and of the international boundary line; north of the Gulf of Mexico and the Rio Grande, and on and east of a north and south line running as follows: Following the boundary line between the state of North Dakota and the state of Montana and the boundary line between the states of South Dakota and Wyoming and Nebraska and Wyoming to the line of the Union Pacific extending east from Cheyenne, Wyo., then following the line of the Union Pacific westward to Cheyenne and from Cheyenne running southward through Denver, Colorado Springs, [fol. 284] Pueblo and Trinidad, Colo., then following the line of the Atchison, Topeka and Santa Fe Railway through Raton and Las Vegas, N. Mex., to Albuquerque, N. Mex., then south along the line of the Atchison, Topeka & Santa Fe Railway to El Paso, Tex.

Mountain-Pacific Group

All that territory lying between the line last described and the Pacific Coast, not including Alaska.

The Commission quoted paragraph (3) of section 15a of the interstate commerce act, which provides that the Commission shall from time to time determine the fair return on the property value of the carriers, and that in making such determination it shall give consideration to the transportation needs of the country and the necessity of enlarging facilities, provided that during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may in its discretion add thereto a sum not exceeding one-

half of one per centum to make provision for improvements, betterments or equipment chargeable to capital account.

The Commission stated that evidence had been submitted tending to show that it should accord to the carriers the maximum per cent authorized by Congress, because of the high rates of interest now prevailing. The Commission cited evidence to show that with discounts and commissions the total cost of raising capital in certain recent instances had been 7½ per cent per annum.

[fol. 285] Efficiency in Operation

The Commission stated that it was the view of the carriers that existing facilities were inadequate and that shippers were unanimously of the opinion that the transportation service had been and was unsatisfactory. Certain shippers raised the question whether considerations other than inadequacy of facilities—notably labor difficulties—were not equally responsible for the admittedly poor service. Witnesses for the carriers were unable to state explicitly what economies in operation, if any, might be presently effected. The opinion was expressed that certain increases in operating expenses were apparently unavoidable.

The Commission referred to the fact that war passenger traffic was remunerative because of troop movements and elimination of unnecessary trains. During the war there was a marked increase in the loading of freight cars. The Commission stated that it was apparent that there might be increases in expenses not related to the general increase in prices which might offset any economies that might be effected in other directions.

Property Investment

The Commission considered the valuations of the carriers' property submitted by the carriers, and its own work of valuation of the railroads.

From a consideration of all the facts the Commission found that the value of the steam-railway property of the carriers subject to the interstate commerce act held for and used in the service of transportation was, for the pur-
[fol. 286] pose of that particular case, to be taken as approximating the following:

Eastern group, as defined by the carriers	$ 8,800,000,000
Southern group, as defined by the carriers	2,000,000,000
Western group, as defined by the carriers, including both the Western and Mountain-Pacific groups herein designated	8,100,000,000
Total	$18,900,000,000

The Commission stated that it was not thought advisable to delay the decision of this matter to permit an accurate apportionment of the value of such properties, particularly as the result would not materially affect the determination it reached.

The Constructive Year

The Commission stated that in estimating their financial needs for the immediate future, the carriers had based their figures on the actual performance for the twelve-month period ending October 31, 1919, with certain adjustments. This period was considered more representative of normal conditions than the calendar year 1919, for the reason, among others, that the bituminous coal strike began on November 1, 1919. The Commission described the method of gathering information, which included sending questionnaires to the carriers.

The Commission stated that the difficulty of making an accurate analysis of the results of operation during the constructive year was due in part to the incompleteness of the carriers' figures.

The Commission cited instances to indicate that different [fol. 287] methods were followed by different carriers in compiling their information. The Commission stated that to the extent that different methods were employed the results are subject to criticism and that the inadequacies of the data furnished by the carriers increased substantially the difficulty of forecasting the results of operation for the two year period.

The Commission stated that some of the important adjustments made subsequent to the filing of the original data were based on data hastily obtained, in part by telegraph, from a few carriers regarded as typical. The Commission called attention to the fact that the details of a number of adjustments could not be accepted as accurate.

The Commission said that the proposals of the carriers made no allowance for increased wages of railway employees not then effective. On July 20, 1920, after the close of the hearings and oral argument the United States Railroad Labor Board announced a decision awarding approximately $618,000,000 as increased wages. The Commission stated that in each group it would deal first with the evidence as presented and then refer to the effect of the wage award.

Revenue Needs of Carriers in Eastern Group

The Commission stated that the eastern carriers asked an annual net railway operating income of $559,409,933, representing 6 per cent on a book cost of $9,323,498,898. The Commission found that the actual net railway operating income for the year ended October 31, 1919, was $220,981,068; that the income compiled from the questionnaires for such period was $112,465,003; and that the figure re- [fol. 288] flecting the further adjustments made subsequent to the receipt of the questionnaires was $18,008,219.

The carriers proposed a general increase of 30 per cent in charges for freight transportation.

The Commission also compared the income for the year ended October 31, 1919 with the income of class I railroads, excluding switch and terminal companies, for the years 1915, 1916 and 1917, which was $354,711,079.

The Commission stated that not only was there a sharp decline in railway operating income during the next three or four years, but the operating ration had increased at a rate that caused serious concern. The Commission stated that for the period of five years beginning with 1912 and ending with 1916, the eastern carriers were spending out of each dollar of operating revenue received approximately 71 cents for operating expenses. The Commission traced the increase to 97.68 in the first four months of 1920. The Commission stated that the operating ratio for the first four months of 1920 meant that during that period, after payment of operating expenses, there was left 2.32 cents out of each dollar for the payment of taxes, uncollectible railway revenues, joint facility rents, hire of equipment, rents for lease of road, interest on funded and unfunded debt and other fixed charges, dividends and certain other items. The Commission stated that during the period of six years, be-

ginning with 1912 and ending with 1917, it took approximately 28.79 cents out of every dollar of operating revenue to pay the items mentioned.

The Commission considered the actual results of opera-
[fol. 289] tion for the first four months of 1920 and found that the income was substantially less than had been estimated, but stated that it was unsafe to assume that the results fairly indicated what the results would be for the year. The Commission cited the figures of the number of ton-miles of revenue freight for class I carriers in the eastern group during the years 1912 to 1919, inclusive, showing that the tonnage for 1919 was the lowest since 1915. The Commission stated that it was estimated that the wage award made by the Labor Board on July 20, 1920, would add $314,562,000 annually to the operating expenses of the eastern carriers, or 12.2 per cent of the operating revenue as finally adjusted for the constructive year.

Revenue Needs of Carriers in Southern Group

The Commission stated that the financial condition of the carriers in the southern group as a whole was more favorable than that of the carriers in either of the other groups. The southern carriers asked that the rates be increased sufficiently to earn a net railway operating income of $136,049,091, which represents a return of 6 per cent on a book cost of $2,267,484,847. The Commission found the actual net railway operating income for the year ended October 31, 1919, was $51,208,428; that the adjusted income for such period was $36,743,074, and that the finally adjusted income for such period was $16,269,429.

The Commission stated that the southern carriers estimated that a general increase of approximately 31 per cent in freight revenue would be necessary to return the amount claimed.

The Commission considered further figures as to op-
[fol. 290] erating income showing that it declined sharply in 1919. The Commission stated that the operating ratio of these carriers during the six years ended 1917 varied from 65.04 to 74.1. The Commission traced the changes in the operating ratio and stated that for the first four months in 1920 it was 86.22. The Commission said that during the six years ended 1917, 27.05 cents out of every dollar of revenue earned was required to pay taxes, uncol-

lectible railway revenues, rents for use of joint facilities, equipment, and leased roads, interest on funded and unfunded debt, dividends, and other miscellaneous income deductions. The Commission compared the actual income for the first four months of 1920 with the estimated income and found that the carriers had earned nearly as much in the first four months as the estimate made on the basis of a whole year's operations. The Commission concluded that the southern carriers substantially over-estimated their needs.

Calculating from previous experience the Commission estimated that the total income for 1920 would be $38,490,914, compared with $136,049,091, which the carriers urged they were entitled to receive.

The Commission stated the number of ton-miles of revenue freight for class I carriers in the southern group carried from 1912 to 1919, inclusive, showing a decrease in 1919 from 1917 and 1918.

The Commission stated that the wage award made by the Labor Board on July 20, 1920, would add approximately $68,598,000 annually to the operating expenses, equivalent to 11.8 per cent of the total railway operating revenue for the constructive year.

[fol. 291] Revenue Needs of Carriers in Western Group

The Commission stated that the western carriers asked a net railway operating income of $537,833,024, representing a return of 6 per cent on a book cost of $8,963,883,753. The Commission compared the actual net railway operating income for the year ended October 31, 1919 in the amount of $265,185,254, the adjusted income for such period in the amount of $226,831,658, and the finally adjusted income for such period in the amount of $184,939,759.

The Commission stated that the carriers estimated that a general increase of approximately 24 per cent in freight revenues was required to return the amount claimed.

The Commission stated the operating income for various years showed that it declined from 1917 to 1918 and from 1918 to 1919. During the six years ended 1917 the operating ratio ranged from 62.69 to 67.68. For the first four months of 1920 it was 86.06.

The Commission made certain calculations based on the net income for the first four months of 1920, and estimated the net income for the full year 1920 at $101,724,123. The Commission stated further data on which it based an estimate of the gross revenues for 1920.

The Commission stated the number of ton-miles of revenue freight for class I carriers in the western group from 1912 to 1919, inclusive, showing a decline in 1919 from 1917 and 1918.

The Commission stated that the carriers estimated that the wage award made by the Labor Board on July 20, 1920, would add approximately $234,840,000 annually to their operating expenses. This is equivalent to 11.2 per [fol. 292] cent of the total railway operating revenue for the constructive year.

Extent and Method of Obtaining Needed Additional Revenue

The Commission stated that in the original applications increases were asked applicable to freight traffic only, but that in the amended proposals the carriers proposed to make increases upon all classes of traffic.

Passenger Traffic

The Commission reviewed the number of revenue passenger miles for various years showing that it had greatly increased from 1911 to 1919, inclusive.

The Commission stated that in part because of conditions growing out of the war passenger traffic had become relatively more profitable during the last three years.

The Commission set forth the figures submitted by carriers showing the operating ratio for freight service and the operating ratio for passenger service, from which it appeared that for most of the carriers named the operating ratio was lower for passenger service.

The Commission stated that there appeared to be a wide discrepancy between the figures presented for the various lines and too much reliance should not be placed upon this showing. Resumption of more frequent train service would tend to increase the operating ratio for passenger traffic and the carriers contended that it was uncertain whether an increase in passenger fares would yield increased reve-

[fol. 293] nue in proportion because of possible reduction in travel. The Commission concluded that such increase as was approved upon passenger traffic might properly be less than the percentage increase applied to freight traffic. The Commission considered the suggestion that additional revenue might be obtained by placing an extra charge upon passengers in sleeping and parlor cars. The Commission considered evidence submitted by the Pullman Company on the ground that such a charge reduces travel in cars of that type.

The Commission stated that a surcharge of 50 per cent of the charge for space in sleeping and parlor cars would produce revenue for the eastern group of $17,556,108, the southern group, $5,582,036 and the western group, $20,231,200. The Commission then concluded that all passenger fares and charges might be increased 20 per cent; that excess baggage rates might be increased 20 per cent; that a surcharge upon passengers in sleeping and parlor cars may be made amounting to 50 per cent of the charge for space in such cars, and that the rates on milk and cream might be increased 20 per cent.

Switching and Special Services

The Commission considered increases in charge- for switching and special services, and concluded that charges should be increased and the percentage of increase should be determined by the percentage applicable in the group where the service is performed.

[fol. 294] Freight Rate Increases

The Commission stated that in their original applications the carriers proposed general percentage increases in freight rates in the respective groups as follows: eastern 30 per cent, southern 31 per cent, western 24 per cent.

The Commission stated that the carriers indicated their willingness where necessary to revise rates to restore, in so far as is deemed practicable, existing recognized relationships and differentials.

The Commission stated that it would be desirable, if it were possible, to determine definitely the commodities, the sections of the country, and even the individual rates which can best bear the burden of increases and the rela-

tionships of the rates and differentials which will be disturbed by a percentage increase, but that this was precluded by the necessity of prompt action.

Percentage Increases Versus Flat Increases and Maintenance of Differentials and Relationships

The Commission stated that the shippers were divided into three groups: (a) those who sought the preservation of existing relationships and differentials either by specific or flat increases or by applying the percentage increase to base rates and employing in connection therewith differentials from and to other points; (b) those who advocate a percentage advance in all cases, and (c) those who advocate a percentage increase with a maximum.

The Commission stated that many relationships in cents per unit were disturbed by the increases made by the Di- [fol. 295] rector General, except upon a few commodities of heavy movement which were subjected to specific increases in cents or dollars and cents per unit, and that a relatively small proportion of these relationships have subsequently been restored.

The Commission considered the advisability of maintaining differentials and reviewed the arguments for and against.

The Commission stated that without attempting to pass finally upon the question whether in given cases differentials should or should not be maintained, it was evident that no general program of maintaining differentials could be made effective coincident with the increases here approved without materially delaying their effective date as definite testimony covering individual situations was before it in only a very few cases.

The Commission concluded that with the exceptions hereinafter noted general percentage increases made to fit the needs of the four groups were the most practicable, but that this conclusion was without prejudice to any subsequent finding in individual situations.

Provisions for Improvements, Betterments or Equipment

The Commission referred to section 15a of the interstate commerce act and stated that the increases authorized were intended to yield the additional ½ of 1 per cent for improvements authorized by that section.

[fol. 296] Conclusion as to General Increases

The report then proceeds as follows:

"We are of opinion and find that the following percentage increases in the charges for freight service, including switching and special services,[26] together with the other increases hereinbefore approved would under present conditions result in rates not unreasonable in the aggregate under section 1 of the act and would enable the carriers in the respective groups, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of 5½ per cent upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and ½ of one per cent in addition; eastern group, 40 per cent; southern group, 25 per cent; western group, 35 per cent; Mountain-Pacific group, 25 per cent.

In view of the different percentages of increase herein approved, it becomes necessary to make provision for rates between the various groups.

(1) Where rates are constructed by the use of combinations upon gateways between any two groups, the through rates should be increased by applying to each factor its respective percentage.

(2) Rates between points within a group and points on the border line of such group should be increased according to the percentage applicable to the group. Where a river constitutes a boundary line between two groups, points on both banks thereof shall be considered as border-line points.

(3) Joint or single-line through rates between points in one group and points in other groups should be increased 33⅓ per cent.

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[26] The increases should apply to special services in accordance with our findings under the caption "Switching and Special Services," supra, p. 247.

(4) In cases where the rates over different routes be-
[fol. 297] tween the same points would, by a strict application of the varying percentages of increase herein approved, be subject to different percentages, the lowest percentage applicable to any of the routes may be applied to the rates over all of such routes.

In the construction of rates in accordance with these findings it is not intended that the group boundaries hereinbefore designated should be strictly observed, but the territorial boundaries heretofore recognized should be observed. For example, Richmond, one of the so-called Virginia cities, should continue on the basis which it has heretofore enjoyed.

The above findings apply to all steam railroads subject to our jurisdiction, including so-called "short lines," but not to railroads in Alaska.

While the New England carriers are included in the eastern group and are subject to the percentage for that group, the evidence as to the disproportionate needs of the New England lines make it desirable that the carriers give careful consideration to the divisions of joint rates accruing to these lines.

Individual Commodities

Considerable evidence was presented with respect to the rates upon a number of individual commodities, including coal, lumber, cement, fruits and vegetables, petroleum, brick, sand, gravel and rock, asphalt, slag, grain, live stock, packing-house products, ore, bullion, potash, salt, fertilizers, and terra cotta.

Various issues have been raised or are presented as to these commodities, the principal of which are as follows: (a) Whether there should be departures from the general percentage increases by maintaining differentials or by the application of specific increases instead of percentages; (b) whether maximum increases should be provided in order to avoid the full percentage increase upon relatively high rates from distant points of production to important markets; (c) whether because of the high cost of production and marketing of some commodities the percentage
[fol. 298] increases proposed by carriers will result in a cost delivered at points of market or consumption so great

as to curtail production and distribution, an undesirable situation at this time of world shortage of commodities; (d) whether a more general necessary use warrants a lower transportation charge; (e) whether the rates effective June 24, 1918, before General Order No. 28 became effective, should be made the basis of readjustment now by applying thereto a 25 per cent increase and superimposing thereon the percentage increases now found reasonable. Our general conclusions as to the impracticability of specific increases or of attempting now to maintain differentials dispose of a number of these contentions. It should also be said that while we do not here sanction specific increases in lieu of percentages, we are not to be understood as expressing disapproval of increases of that character made by the Director General. Such increases were made under war conditions and under circumstances that do not now exist.

Our attention was called at the hearing to a number of formal complaints now pending, and we are asked to except from the general increase the rates in issue in those complaints. This would have the effect, during the pendency of those proceedings, of giving the rates in question a preferred standing and of exempting them from the general increase. In our opinion, a fairer disposition will be attained by applying the general increase to these rates; with the understanding that this action is without prejudice to any future findings."

The Commission then considered the question of special treatment for coal, lumber, petroleum, fruits and vegetables, sand, gravel, rock and slag, live stock and packing house products, iron ore, other ores, grain and grain products. With a few minor exceptions the Commission concluded that the general percentage increases should apply even though special relationships had previously existed.

The Commission then considered the differential rates [fol. 299] between ports, applications of boat lines for increases in rates, freight rates of electric lines, minimum charges, specific divisions of rates between carriers, freight rates to and from foreign countries, and long and short haul charges under section 4 of the interstate commerce act.

The report then concludes as follows:

"Disposition of Fractions

In computing and applying all increased rates authorized herein fractions will be treated as follows:

Where rates are stated in amounts per 100 pounds or any other unit, except as provided in the succeeding paragraph, fractions of less than ¼ of a cent will be omitted. Fractions of ¼ of a cent or greater but less than ¾ of a cent will be stated as ½ cent. Fractions of ¾ of a cent or greater will be increased to the next whole cent. This rule will also be followed in computing passenger fares.

Where rates are stated in dollars per carload, including articles moving on their own wheels, when not stated in amounts per 100 pounds or per ton, amounts of less than 25 cents will be dropped; thus $25.24 will be stated as $25. Amounts of 25 cents or more but less than 75 cents will be stated as 50 cents; thus, $25.65 will be stated as $25.50. Amounts of 75 cents or more but less than $1 will be raised to the next dollar.

Outstanding Orders of the Commission

An order will be entered modifying outstanding orders of the Commission to the extent necessary to permit the carriers to make effective the increases herein authorized.

Effective Date of New Rates and Subsequent Adjustments

In view of the existing situation it is important that the increased rates be made effective at as early a date as practicable. The increases herein approved may be made [fol. 300] effective upon not less than five days' notice to the Commission and to the general public by filing and posting in the manner prescribed in the interstate commerce act. The authority herein granted will not apply to any rates, fares, or charges filed with this Commission to become effective later than January 1, 1921.

Most of the factors with which we are dealing are constantly changing. It is impossible to forecast with any degree of certainty what the volume of traffic will be. The general price level is changing from month to month and from day to day. It is impracticable at this time to adjust

all of the rates on individual commodities. The rates to be established on the basis hereinbefore approved must necessarily be subject to such readjustments as the facts may warrant. It is conceded by the carriers that the readjustments will be necessary. It is expected that shippers will take these matters up in the first instance with the carriers, and the latter will be expected to deal promptly and effectively therewith, to the end that necessary readjustments may be made in as many instances as practicable without appeal to us.

An appropriate order will be entered."

Eastman, Commissioner, concurring opinion.

McChord, Commissioner, concurring opinion.

Loesch, Scofield, Loesch & Burke, Attorneys for Appellant.

[fol. 301] Record from Appellate Court, First District, to Supreme Court

Nisi Prius Gen. No. B. 116212, B. 118056, B. 119310

Appellate Gen. No. 37565

Supreme Court Gen. No. —

ILLINOIS BRICK COMPANY, a Corp., Appellee,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, et al., Appellant

On Appeal of The Pennsylvania Railroad Co., a Corp.

[fol. 302] At a term of the Appellate Court begun and held at Chicago, on Tuesday, the fourth day of December, in the year of our Lord One Thousand Nine Hundred and Thirty-four, within and for the First District of the State of Illinois.

Present: Hon. John M. O'Connor, Presiding Justice; Hon. William H. McSurely, Justice; Hon. David F. Matchett, Justice.

Sheldon W. Govier, Clerk.

John Toman, Sheriff.

No. 37565

ILLINOIS BRICK COMPANY, a Corporation, Appellee,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, et al., Appellant

On Appeal of The Pennsylvania Railroad Company, a Corporation

Appeal from Cook Circuit

Be it remembered, That heretofore, on the 3rd day of April, A. D. 1934, it being one of the days of said April

Term, A. D. 1934, certain proceedings were had in said Court and entered of record in words and figures following, to-wit:

[fol. 303] At a term of the Appellate Court begun and held at Chicago, on Tuesday, the third day of April, in the year of our Lord One Thousand Nine Hundred and Thirty-four, within and for the First District of the State of Illinois.

Present: Hon. David F. Matchett, Presiding Justice; Hon. John M. O'Connor, Justice; Hon. William H. McSurely, Justice.
Sheldon W. Govier, Clerk.
William D. Meyering, Sheriff.

Court met pursuant to law.
Court opened by proclamation.

And afterwards, on the 7th day of May, A. D. 1934, there was filed in the office of the Clerk of said — a certified copy of the order of the Supreme Court of Illinois transferring said cause to the Appellate Court, which said order is in the words and figures following, to-wit:

[fol. 304] UNITED STATES OF AMERICA:

At a term of the Supreme Court begun and held in Springfield on Tuesday, the third day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-four, with- and for the State of Illinois.

Present: Warren H. Orr, Chief Justice; Justice Clyde E. Stone, Justice Norman L. Jones, Justice Paul Farthing, Justice Frederic R. DeYoung, Justice Lott R. Herrick, Justice Elwyn R. Shaw.
Otto Kerner, Attorney General.
Warren C. Murray, Marshal.
Attest: Adam F. Bloch, Clerk.

Be it remembered, that to-wit, on the 17th day of April, A. D. 1934, the same being one of the days of the said April term of said Supreme Court, the following proceedings were by said Court had and entered of record in the words and figures as follows, to-wit:

No. 22359

ILLINOIS BRICK COMPANY, Appellee,

vs.

PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant

Appeal Circuit Court Cook

And now on this day, this cause having been argued orally by Edward M. Burke and David L. Dickson for appellant and by A. R. Miller for appellee, and the Court being now advised in the premises, is of the opinion, find and adjudge that this case was wrongfully appealed to this court.

Therefore it is ordered by the Court that this case be and the same is hereby transferred to the Appellate Court of the First District of the State of Illinois, and the Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the Clerk of said Appellate Court.

And it is further considered by the Court that the said appellee recover of and from the said appellant its costs by it in this behalf expended and that it have execution therefor.

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and seal thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State, this 18th day of April, A. D. 1934.

Adam F. Bloch, Clerk Supreme Court. (Seal.)

[fol. 305] And afterwards, on the 17th day of May, A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 306] June Term, A. D. 1934, Calendar

In the Matter of the Assignment of Cases to the Third Division Appellate Court, First District, Illinois

On the Court's own motion it is ordered that the following numbered cases on the June Term Calendar, A. D. 1934,

of said Court be and the same are hereby assigned to the Third Division Appellate Court for hearing and determination, to-wit:

37565, Illinois Brick Co., a Corp., v. The Pennsylvania Railroad Co., a Corp.

And afterwards, on the 27th day of June, A. D. 1934, it being one of the days of the June Term, A. D. 1934, of said Court, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 307] 37565

ILLINOIS BRICK COMPANY, a Corporation, Appellee,

vs.

PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Circuit

This day came appellant by its counsel and moved the Court for leave to file an additional abstract in said cause instanter as per affidavit filed herein. And the Court being fully advised in the premises, doth order that said motion be and the same is hereby allowed.

And afterwards, on the 5th day of July, A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 308] 37565

ILLINOIS BRICK COMPANY, a Corporation, Appellee,

vs.

PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Circuit

This day came appellant by its counsel and moved the Court for leave to file additional authorities in said cause instanter. And the Court being fully advised in the prem-

ises, doth order that said motion be and the same is hereby allowed.

And afterwards, on the same day, to-wit, the 5th day of July, A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 309] 37565

ILLINOIS BRICK Co., a Corporation, Appellee,

vs.

PENNSYLVANIA RAILROAD Co., a Corporation, Appellant

Appeal from Cook Circuit

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on briefs filed.

And afterwards, on the same day, to-wit, the 5th day of July, A. D. 1934, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 310] 37565

ILLINOIS BRICK COMPANY, a Corporation, Appellee,

vs.

PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Circuit

At the request of the Judges of the Third Division, Appellate Court, it is ordered that the order heretofore entered herein in said cause on May 17th, A. D. 1934, assigning said cause to the Third Division, Appellate Court, be and the same is hereby vacated and set aside.

And afterwards, on the 24th day of December, A. D. 1934, it being one of the days of the December Term, A. D.

1934, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 311] No. 37565

ILLINOIS BRICK COMPANY, a Corporation, Appellee,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, et al., Appellant

On Appeal of The Pennsylvania Railroad Company, a Corporation

Appeal from Cook Circuit

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective; and that in the record there is no error: Therefore, it is considered by the Court that the judgment aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant its costs by it in this behalf expended, to be taxed, and that it have execution therefor.

And afterwards, on the 27th day of January, A. D. 1935, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 312] 37565

ILLINOIS BRICK COMPANY, a Corporation, Appellee,

vs.

PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Circuit

The Court having considered the petition of appellant, praying for a rehearing in said cause, and being now fully

advised in the premises, doth order that the prayer of said petition be and the same is hereby denied.

It is further ordered by the Court that the opinion of this Court heretofore filed herein on December 24th, A. D. 1934, be and the same is hereby slightly modified and as modified is refiled herein.

And afterwards, on the 4th day of February, A. D. 1935, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 313] 37565

ILLINOIS BRICK COMPANY, a Corporation, Appellee,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Circuit

The Court having considered the motion of appellant, that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for a writ of certiorari to review the judgment of this Court in said cause shall have expired without any such petition having been filed, and if such petition for said writ shall have been filed within the proper time, then until said writ of certiorari shall have been granted or refused; and the Court, being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And afterwards, on the 22nd day of April, A. D. 1935, it being one of the days of the April Term, A. D. 1935, there was filed in the office of the Clerk of said Court a certified copy of an order of the Supreme Court of Illinois denying the Writ of Certiorari in said cause, which said order is in the words and figures following, to-wit:

[fol. 314] UNITED STATES OF AMERICA:
State of Illinois, ss:

At a Supreme Court begun and held at Springfield, on Tuesday, the second day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-five, within and for the State of Illinois.

Present: The Honorable Norman L. Jones, Chief Justice; Honorable Clyde E. Stone, Justice; Honorable Lott R. Herrick, Justice; Honorable Elwyn R. Shaw, Justice; Honorable Warren H. Orr, Justice; Honorable Paul Farthing, Justice; Honorable —— ——, Justice.
Otto Kerner, Attorney General.
Warren C. Murray, Marshal.
Attest: Adam F. Bloch, Clerk.

Be it remembered, that to-wit, on the 16th day of April, A. D. 1935, the same being one of the days of the said April term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

April 16, A. D. 1935

Certiorari to First District
B. 116212—37565

No. 23015

PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Petitioner

v.

ILLINOIS BRICK COMPANY, a Corporation, Respondent

And now on this day the Court having duly considered the petition for a Writ of Certiorari herein as well as the record, abstract, brief and argument filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a Writ of Certiorari herein.

And it is further considered by the Court that the said respondent recover of and from the said petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Adam F. Bloch, Clerk of the Supreme Court of the State of Illinois and keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said Supreme Court at Springfield, in said State, this 19th day of April, in the year of Our Lord one thousand nine hundred and thirty-five.

Adams F. Bloch, Clerk of the Supreme Court. (Seal.)

Filed Appellate Court, Apr. 22, 1935. Sheldon W. Govier, Clerk.

[fol. 315] And afterwards, on the same day, to-wit, the 22nd day of April, A. D. 1935, the following proceedings were had and entered of record in said cause, to-wit:

[fol. 316] 37565

ILLINOIS BRICK COMPANY, a Corporation, Appellee,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant

Appeal from Cook Circuit

The Court having considered the motion of appellant that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of the United States for a Writ of Certiorari to review the judgment of this Court in said cause shall have expired without any such petition having been filed, and if such petition for said writ shall have been filed within the proper time, then until said Writ of Certiorari shall have been granted or refused, and having also considered the counter suggestions of the appellee to said motion, and the Court being fully advised in the premises, doth grant said motion, and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

And heretofore, on the 24th day of December, A. D. 1934, there was filed in the office of the Clerk of said Appellate Court the written opinion of this Court, which opinion is in the words and figures following, to-wit:

[fol. 317] 37565

ILLINOIS BRICK COMPANY, a Corporation, Appellee,

vs.

PENNSYLVANIA RAILROAD COMPANY, a Corporation, Appellant

Appeal from Circuit Court of Cook County

Mr. Justice MATCHETT delivered the Opinion of the Court.

I. Defendant Railroad company was allowed an appeal to the Supreme Court from a judgment entered against it in the Circuit Court of Cook County upon the finding of the court for the sum of $42,428.09, plus costs and attorney's fees allowed in the sum of $2,000. The appeal was taken to the Supreme Court upon the theory that questions of constitutional law were involved, and the briefs filed were largely devoted to a discussion of those questions. The Supreme Court, however, (without filing an opinion,) entered on order transferring the appeal to this court, thus eliminating, as we understand, these constitutional questions.

Defendant is a common carrier. The basis of the suit brought by plaintiff is an order entered by the Illinois Commerce Commission on April 16, 1924, which incorporated therein a previous order of that Commission entered on November 7, 1934. This order awarded reparation to plaintiff on account of freights paid by it upon shipments of brick made from Bernice, Illinois, to certain points within the Chicago switching district between October 28, 1920, and February 15, 1922. As to shipments made prior to that time, namely, between March 1, 1920, and October 28, 1920, the Commission found that the complaints of the Brick Company had not been filed within the time required by statute, and that reparation for these shipments was barred.

Statements were filed with the Illinois Commerce Commission on December 31, 1923, showing excess charges col-

lected by the Pittsburgh, Cincinnati, Chicago & St. Louis [fol. 318] Railroad Company (then co-defendant, afterwards dismissed out of the case) in the sum of $7,095.82, and similar excess charges collected by the Pennsylvania Railroad in the sum of $21,869.90. The order of April 16, 1924, incorporating the order of November 7, 1923, recited the reservation of jurisdiction for the purpose of awarding reparation for charges collected in excess of rates found to be just and reasonable and ordered that defendants be authorized and directed to pay the amount of reparation so found to be due plaintiff on or before May 1, 1924, with interest at the legal rate. The railroads did not pay.

Thereafter, on December 31, 1924, March 3, 1925, and April 13, 1925, plaintiff filed three suits, one in assumpsit, one in tort and one in debt. In each case the order of the Illinois Commerce Commission of April 16, 1924, was set up verbatim. It was averred that the rates collected by defendant were unreasonable, discriminatory and unduly preferential and prejudicial, and in violations of sections 32 and 38 of the Public Utility Act (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 111⅔, secs. 32 and 38), and that plaintiff was entitled to recover the amount of the order with attorney's fees, pursuant to section 72 of chapter 111⅔ of the statutes (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 111⅔, sec. 72, par. 76).

Upon the trial plaintiff offered in evidence a certified copy of the complete record before the Illinois Commerce Commission; also evidence showing that in 1922 the Pennsylvania Railroad company leased the Pittsburgh, etc. Company for 999 years. Plaintiff also offered a certified copy of the order of the Interstate Commerce Commission dated July 10, 1922, approving this lease, effective as of January 1, 1921. Defendant offered in evidence a certified copy of an order of the Illinois Commerce Commission dated Au- [fol. 319] gust 10, 1920, Docket 10620, to which was attached a copy of the report of the Interstate Commerce Commission, dated July 29, 1930, In Ex Parte 74, also a certified copy of the order of the Interstate Commerce Commission entered January 11, 1921, Docket 11703, Re Intrastate Rates in Illinois. Evidence was also offered by plaintiff with reference to attorney's fees.

At the conclusion of the trial plaintiff dismissed as to the Pittsburgh, etc. Company, and the court deducted from

the sum of $28,965.72, mentioned in the order of the Commission, the sum of $292.70, being the amount of supposed excess charges of the Pittsburgh Company made between October 28, 1920, and January 1, 1921, the date upon which the lease to the Pennsylvania Railroad Company became effective. There was a finding for the amount of reparation due from both defendants against the Pennsylvania Company with interest at 5 per cent from May 1, 1924, making a total finding of $42,428.09, plus $2,000 costs allowed as attorneys' fees. There was a motion by the Pennsylvania Company in arrest of judgment, which was overruled, and the judgment was entered.

II. Plaintiff is a manufacturer and shipper of common brick; its place of business is at Bernice, Illinois, which is about two miles southeast of an irregular area known as the Chicago switching district. While Bernice is not actually within this district, it is so close to it that plaintiff's product is in direct competition with plants located within the district. At the times for which reparation was allowed defendants charged rates of 93½ cents, 94½ cents and 98 cents per ton on common brick shipped from Bernice to points within the switching district. All these shipments were purely intrastate. At the same time the intrastate rate within the district charged plaintiff's competitors for [fol. 320] the same product was 40 to 42 cents per ton.

The rates charged came into existence as follows: In August, 1911, the Lowrey tariff, so called, Illinois Public Utilities Commission 39 (carrier made), was adopted by the shippers and carriers in the Chicago district. It fixed a rate of 30 cents per ton on all commodities for shipments between points located within the switching district. Common brick, because it was a cheap, low grade commodity, was given a lower rate of 25 cents per ton for a single-line haul. Bernice and some other points were so close to the switching district and so directly in competition with plants located within it that a 25 cent rate for common brick was fixed for shipments which originated at these points destined to locations within the switching district for a single-line haul. By the Lowrey tariff Bernice was put on a parity with points of origin within the district. This 25 cent rate continued until June 25, 1918, when general order No. 28, issued by the director general of traffic as a war measure, took effect. The purpose of that order was to secure addi-

tional revenue for the railroads. It increased railroad freight rates throughout the whole country by 25 per cent with certain exceptions where flat increases were made. One of these exceptions was common brick via single-line hauls, and on this commodity a flat increase of 2 cents per hundred pounds, or 40 cents a ton, was added to the former rates. The two-line rates on brick within the district was under the Lowrey tariff carried as general commodities. Thus the two line rate was advanced only 25 per cent, making it 40 cents per ton, while as a result of this order the new one line rate was made 70 cents per ton, using the Commission rule for the disposition of fractions. The result was so clearly unfair that the director general issued Freight Rate Authority 1887, effective October 18, 1918. This order substituted within the Chicago switching district a 25 per cent increase on common brick for the flat 40 cents per ton increase which had been fixed by general order [fol. 321] No. 28. By inadvertence, apparently no substitution was made as to rates on common brick from Bernice and other like competitive points which were outside the switching district. The result was that within the district the rate for common brick became 30 cents per ton, while from Bernice for the same commodity it was 70 cents per ton.

Plaintiff and shippers similarly situated filed a complaint with the Interstate Commerce Commission. The case is known as Docket 11317 and was decided October 27, 1921. This was, however, after the determination of the jurisdiction of the Interstate Commerce Commission over intrastate rates. Under the provisions of the transportation act of 1920 that jurisdiction ceased September 1, 1920. The report of the Interstate Commission said: "We are asked to award reparation and to establish reasonable and nonprejudicial rates for the future. Except under circumstances not here present, our jurisdiction over intrastate rates is limited to the period of federal control." In both the report and the order which was entered pursuant to it, the Commission was careful to limit its findings to interstate rates. Apparently, it was wholly without jurisdiction to pass on intrastate rates and expressly disclaimed any intention of doing so. The report of the Commission, however, found that the rate of 70 cents per ton from Bernice to interstate destinations within the Chicago switching district was not unreasonably but unjustly discriminatory to

the extent that it exceeded by more that 10 cents per ton contemporaneous rates applicable to interstate shipments between points wholly within the switching district. It ordered the carriers to remove such discriminations not later than February 16, 1922.

While this proceeding was pending before the Interstate Commerce Commission, that Commission held a general rate investigation known as Ex Parte 74, 58 I. C. C. 220. As a result of that investigation the Interstate Commerce [fol. 322] Commission authorized the railroads to increase freight rates in general by various percentages which ranged from 25 to 40 per cent. This order was limited solely to interstate rates and did not undertake to apply any specific rates to any specific commodities. In fact, it recited that to prevent injustice necessary adjustments would have to be made.

Thereafter, the Illinois Commerce Commission, in a proceeding known as Docket 10620, authorized an increase in the general level of intrastate rates in order to make the same conform to Ex Parte 74. This order was entered August 10, 1920, and authorized an increase in the general level of intrastate rates in Illinois by 33⅓ per cent, afterward changed by supplemental order to 35 per cent. Here also he Commission did not give consideration to specific rates. The Interstate Commerce Commission, in Ex Parte 74, having authorized a general increase of 40 per cent in interstate rates in certain parts of Illinois, a complaint was made to that Commission that the increase of 33⅓ per cent and 35 per cent by the Illinois Commission on intrastate rates were not sufficient. That complaint is known as Docket 11703, and by a decision made January 11, 1921, the Interstate Commission required the substitution of a 40 per cent increase in the general level of intrastate rates in Illinois. This was supplementary to Docket 10620. Here again specific or particular rates were not considered by the Commission. The result of the 33⅓ per cent in crease in the general level of rates was to increase the rate on common brick from Bernice to the switching district from 70 to 93½ cents per ton. As a result of the substitution of a 35 per cent increase for the 33⅓ per cent increase the same rates were increased to 94½ cents per ton, and as a result of the order entered in Docket 11703 the rate was increased to 98 cents per ton. On the other hand, as a result of the order of the Interstate

Commerce Commission in Docket 11317, defendant and [fol. 323] other railroads reduced the rates on brick from Bernice and other like points from 98 cents to 50 cents per ton. At this time the rates on brick within the district were from 40 to 42 cents per ton. The railroads at the same time increased these rates to 50 cents, again putting the Bernice rates on a parity within the switching district. The order in Docket 11317 authorized defendant to charge 10 cents per ton more on common brick from Bernice than they charged on brick within the Chicago switching district. Defendant, however, did not take advantage of this privilege but voluntarily restored the parity which had existed during the period of August, 1911, to June 25, 1918.

III. Defendant questions the right and power of the Illinois Commerce Commission to award reparation, because it says that the rates collected by it had been theretofore established by the Interstate Commerce Commission and in part by the Illinois Commerce Commission; that these rates were therefore lawful when collected and could not be retroactively questioned before the Commission, whether acting in a quasi-legislative or quasi-judicial capacity. Defendant relies on Arizona Grocery Co. v. A., T. & S. F. Ry. Co., 284 U. S. 370, 76 L. Ed. 348, which it undertakes to distinguish from Eagle Cotton Oil Co. v. Southern Ry. Co., 51 Fed. (2d) 443, in which certiorari was denied by the Supreme Court of the United States in 284 U. S. 675. The ground of the supposed distinction upon which defendant insists is that in the Eagle Cotton Oil Co. case the original rate fixed by the Commission had expired by limitation and that the new rate attacked was therefore a "carrier-made" rate.

At the same term in which the opinion was filed in the Arizona Grocery Co. case, the Supreme court denied certiorari in the Eagle Cotton Oil Co. case. It is apparent that case received consideration by the United States Supreme Court. Two justices dissenting stated that their reasons for so doing were given by the Circuit Court of Appeals in a concurring opinion in the Eagle Cotton Oil Co. case. [fol. 324] This concurring opinion by Judge Huchison states: "Neither specific approval by the Commission of a general schedule of rates, nor the specific promulgation of a particular rate, prevents the Commission from granting reparation as to that rate, if, upon complaint, it is advised

that reparation should be made." The majority opinion was to the effect that where the Commission was dealing with the whole body of rates throughout the country and was looking at the general level of all rates, and the propriety of particular rates, to which a complainant was a party; was not the subject matter of particular investigation or consideration, it could not be held that the particular rate had been fixed or prescribed by the Commission, or that a claim for reparation would be rejected for that reason. The majority opinion relied on Brimstone R. & Canal Co. v. United States, 276 U. S. 104, 48 S. Ct. 282, 72 L. Ed. 487.

In the Arizona Grocery Co. case the United States Supreme Court affirmed a judgment of the Circuit Court of Appeals of the 9th circuit entered in the same case. See 49 Fed. (2d) 563. The facts are stated at greater length in the Federal report. It appeared that the Grocery Company brought suit against several carriers in the District Court upon an order of the Interstate Commerce Commission providing for reparation, 140 I. C. C. 171. The proceeding found that the rates charged from points in northern California and in southern California upon shipments of sugar to Phoenix, Arizona, were unreasonable and unjust and reparations were awarded. The answers of the railroads were to the effect that in prior proceedings rates to a maximum amount had been fixed by the Commission and had been declared to be just and reasonable. Plaintiff contended that the fixing of a maximum rate was not the fixing of a just and reasonable rate, but that, on the contrary, it was, nevertheless, the duty of the carrier to fix a rate which was just and reasonable, not exceeding the maximum rate fixed by the Commission. In the Supreme Court the judg- [fol. 325] ment was reversed. The opinion stated that the case "turns upon the power of the Interstate Commerce Commission to award reparations with respect to shipments which moved under rates *approved or prescribed by it.*" It was held the Commission did not have such power. The opinion states:

"But it is also to be observed that so long as the Act continues in its present form, the great mass of rates will be *carrier made rates*, as to which the Commission need take no action except of its own volition or upon complaint, and may in such cases *award reparation* by reason of the

charges made to shippers under the theretofore existing rate.

Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."

As we understand the law, the rate fixed becomes legal only in cases where the Commission has upon complaint and after hearing declared what is the maximum reasonable rate which the carrier may charge. In such case the Commission may not thereafter grant reparation on account of the collection of the rate which it itself fixed, acting in its legislative capacity. As to other or carrier-made rates reparation may be awarded.

We do not understand that there is any conflict between the majority opinions in the Eagle Cotton Oil Co. case and the Arizona Grocery Co. case. We think the rule announced in the Arizona Grocery Co. case applicable in the construction of section 72 of the Illinois Public Utility Act. We conclude from the history of the rates collected by defendant as hereinbefore set forth, that the same were essentially carrier-made rates, and hold that plaintiff is not precluded from recovering reparation by any prior order of the Illinois Commission or of the Interstate Commerce Commission. We think it fair to assume that the order of the Supreme Court transferring this appeal to this court indicates that such was its opinion. Moreover, under cir- [fol. 326] cumstances somewhat similar to those which appear here, it was held in Terminal R. R. Assoc. v. Public Utilities Comm., 304 Ill. 312, that the Illinois Commission was not precluded from awarding reparation.

There is no doubt that the Interstate Commerce Commission, upon a petition showing discrimination against interstate commerce resulting from a disparity of intrastate and interstate rates, has jurisdiction to enter an order re-

storing the parity (U. S. v. Louisiana, 290 U. S. 70; Florida v. U. S., 292 U. S. 1; Illinois Commerce Comm. v. U. S. 292 U. S. 783); but there is no issue of that kind here. In case of such unjust discrimination, the proper practice is for the Illinois Commission to take jurisdiction of intrastate rates and make such order as to it may seem just. The order is then subject to review in proper proceedings by the Interstate Commission, but it is not reviewable by the Court of Illinois except for want of jurisdiction, for violation of constitutional provisions, or because it does not rest on any substantial foundation in the evidence, A., T. & S. F. Ry. Co. v. Commerce Comm., 335 Ill. 70.

IV. Defendant also contends that the findings of the order of the Illinois Commerce Commission of April 16, 1924, and evidence on which the findings are based, are not sufficient to support the judgment. Plaintiff contends that the order of November 7, 1923, finding the rates attacked unreasonable and unjustly discriminatory was an appealable order and that defendant having failed to appeal from it is now precluded from litigating the question of the sufficiency of the evidence in that respect. This contention requires a construction of section 68 of the Public Utilities Act (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 111⅔, sec. 68), which provides that failure to appeal from certain orders shall waive the right to have the orders reviewed on the merits by any court. The theory of plaintiff seems to be that the decision as to whether the rates were discriminatory or unreasonable as found by the Illinois Commission in the order entered November 7, 1923, was made by the Commission in the exercise of its administrative or legislative function as distinguished from its quasi-judicial function, and it is said that orders thus made in exercise of its legislative power by the Commission are conclusive whether they relate to past or present rates. The federal decision [fol. 327] construing similar provisions of the Interstate Commerce Act seems to so hold. Mitchell Coal & Coke Co. v. Penn. R. R. Co., 230 U. S. 237; Standard Oil Co. v. U. S., 283 U. S. 235; Glens Falls Portland Cement Co. v. Delaware & Hudson Co., 66 Fed. (2nd) 490. There are expressions to like effect in some Illinois decisions, Campbell v. Commerce Comm., 334 Ill. 293; Indiana Harbor Belt R. R. Co. v. Commerce Comm., 340 Ill. 304.

Plaintiff concedes that the order of award entered April 16, 1924, was not an appealable order. Terminal R. R. Ass'n v. Utilities Comm., 304 Ill. 312. In entering that order the Illinois Commission acted in a semi-judicial capacity, and such orders are not final and appealable. However, the order of November 23, 1923, definitely and finally determined the just and reasonable rate, past and future, for the shipment of common brick from Bernice, Illinois, to points within the Chicago switching district. The order of the Illinois Commission of that date was legislative in character and, we hold, final and appealable. Defendant did not appeal and is therefore precluded under section 68 from contesting that order on the merits. No case precisely in point has been cited, but we hold this to be the reasonable construction of the statute. Nevertheless, we have examined the evidence and think it sufficient to sustain the findings, and we have examined the findings and hold the same sufficient to justify the order for reparation.

Plaintiff, however, further contends that defendant is also precluded by its failure to appeal from arguing the sufficiency of the evidence to sustain the order where, as here, suit is brought under the provisions of section 72.

Defendant does not deny that the rule under federal decisions is as plaintiff contends, but says that a contrary rule has been announced by the Supreme Court of Illinois in Commerce Comm. v. C., C., C. & St. L. Ry. Co., 320 Ill. 214; Moline Consumers Co. v. Ill. Commerce Comm., 353 Ill. 119; Louisville & Nashville R. R. Co. v. Commerce Comm., 353 Ill. 375, and relying on these cases defendant says, "Federal cases can have no authority on this point." In all the Illinois cases cited, the order of the Commission was before the Court by reason of a direct appeal taken by the party complaining as provided for in section 68 of the act, and in no one of them, as it seems to us, was the question [fol. 328] here raised submitted to the court. We think it was not the intention of the Supreme Court of Illinois in these cases to lay down a rule conflicting with that obtaining in federal jurisdictions. It has been held in many cases that the Public Utility Act of Illinois is in essence similar to the Interstate Commerce act, and that federal decisions under the Federal act are most persuasive in the construction of the State utility law. Public Utilities Comm. v. Terminal Railway Assoc., 281 — 181; Terminal R. R. Assoc.

v. Public Utilities Comm. 304 Ill. 312. We holds the findings of the Illinois Commission were sufficient.

The findings as to the unreasonableness and discriminatory character of the rates are to the effect that is clear from a cost study that the rate of 50 cents per ton provides adequate revenue for the transportation of brick from Bernice, Illinois; that it appears that on November 7, 1923, the Commission entered its report, findings and order, which are "made a part hereof," under which the Commission reserved jurisdiction of the subject matter and of the parties for the purpose of entering an order awarding reparation for charges collected in excess of the rates found to be just and reasonable in said order. The order recites: "We accordingly find that the complainant is entitled to an award of reparation in the amount of $28,965.72 and interest at the legal rate from the date of payment for excessive freight charges collected. * * *" There is a further finding to the effect that to the extent that the rates complained of exceed by more than 10 cents per ton the rates contemporaneously applied between points within the switching district were unjustly discriminatory; that complainant has been damaged to the extent that the charges assessed are greater than the charges that would have been assessed had the said charges been predicated at the rate of 50 cents per ton, minimum 60,000 pounds per car. The order for reparation directs the time within which it must be paid and the amount of it. It was unnecessary that the order should make specific findings as to the evidence before the commission. Mitchell Coal & Coke Co. v. Penn. R. R. Co., 230 U. S. 247, 33 Sup. [fol. 329] Ct. Rep. 916, 57 L. Ed. 1472; Mills v. Lehigh Valley R. R. Co., 238 U. S. 473; Glens Falls Portland Cement Co. v. Delaware & Hudson Co., 66 Fed. (2nd) 490, 54 Sup. Ct. Rep. 132. The statute does not require a statement of the evidential or primary facts. It is not concerned with mere forms of expression. The finding of the ultimate facts is enough to give the order of the Commission the effect of prima facie evidence. The findings are sufficient under the rule stated by the Supreme Court of the United States, and we think the rule of the Illinois Supreme court is not otherwise. Chicago & Eastern Illinois Ry. Co. v. Commerce Comm., 341 Ill. 277.

Defendant cites Commerce Comm. v. C., C., C. & St. L. Ry. Co., 320 Ill. 214; L. & N. R. R. Co. vs. Commerce Comm.,

353 Ill. 375. However, in each of these cases the attack upon the order of the Commission was direct by proceedings in the nature of an appeal under the statute. We have already pointed out the similarity between the Interstate Commerce Commission act and the Public Utilities Act of Illinois, making decisions of the Federal courts persuasive. We hold the finding of the order as to discrimination and unreasonableness in the rates collected sufficient. The damage sustained by plaintiff was a mere matter of computation and the finding in that respect is also sufficient.

V. It is also urged that the court erred in allowing plaintiff to introduce in evidence certain exhibits, A and B. Exhibit A tended to show that by the terms of the lease made with the approval of the Interstate Commerce Commission and effective July 10, 1922, defendant Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co. had leased all its property to defendant Pennsylvania Railroad Co. for a term of 999 years, beginning as of January 1, 1921. Exhibit B was a certified copy of a report and order of the Interstate Commerce Commission entered July 10, 1922, in Docket No. 1466, covering this acquisition as of that date upon authorization of the Commission. This evidence [fol. 330] tended to show the liability of defendant for reparation on shipments made from January 1, 1921, to February 15, 1922. The order of the Illinois Commerce Commission in fact finds that the Pittsburgh Railroad Company is "now Pennsylvania Railroad Company." It is urged that this evidence was inadmissible. There are innumerable authorities to the contrary. Terminal R. R. Assoc. v. Utilities Comm., 304 Ill. 312; Cleveland, C., C. & St. L. Ry. Co. v. Blair, 59 Fed. (2nd) 478; Vicksburgh, S. & P. Ry. Co. v. Anderson Tully Co., 261 Fed. 741, affirmed 256 U. S. 408; Atlantic Coast Line R. Co., v. Smith Bros., 63 Fed. (2nd) 747, certiorari denied 77 L. Ed. 1504.

The liability of the Pennsylvania Company having been thus established, plaintiff elected to dismiss as to the other defendant, and so far as the record discloses this was done without any objection on the part of defendant. It would seem that under section 39 of chapter 110 of the former Practice Act, this was proper (Teich v. Ayer, 213 Ill. App. 41), and defendant failing to object on the ground of variance, the objection was waived. (Mayer v. Brensinger, 180 Ill. 110). Moreover, the technical rules of the common law

are not applicable to proceedings of this character, which the cases above cited show. The policy of this State has been definitely declared to be against the enforcement of the technicalities of pleading as known to the common law by the enactment of the Civil Practice Act, effective January 1, 1934.

It is also urged by defendant that the petition for reparation was barred by the limitation of one year under the provisions of section 72 for the filing of a suit based on the award. The record shows, as already stated, that the first of the three suits, which were afterwards consolidated, was begun December 31, 1924, the second, March 3, 1925, and the other April 13, 1925. The final order for reparation was filed by the Illinois Commerce Commission April 16, 1924. [fol. 331] We understand that the limitation statute would not begin to run before the entry of that order. Any other construction of the statute would be most unreasonable, as the delay between the entry of the interlocutory order on November 7, 1923, and the entry of the final order based on it was largely occasioned by the failure of the defendant carrier to file the schedule of shipments as required by the order. The contention is therefore utterly without merit.

Neither is there merit to the further contention that the evidence fails to sustain the allowance of an attorney's fee of $2,000. The evidence offered in behalf of the plaintiff was to the effect that the services rendered were unusual and extraordinary, and there was no evidence offered by defendant tending to show the allowance to be unreasonable. The record is before us, and we are therefore not entirely without information as to the amount of work required and the value of the services. The defenses relied upon are technicalities. As to the merits of the controversy there is no doubt.

The judgment is affirmed.

Affirmed.

O'Connor, P. J., and McSurely, J., concur.

[fol. 332] I, Sheldon W. Govier, Clerk of the Appellate Court in and for the First District of the State of Illinois, do hereby certify that the foregoing pages, numbered 1 to 275 inclusive, are a true copy of the abstract of record filed by the appellant on the 7th day of May, A. D. 1934, and

pages numbered 276 to 300 inclusive are a true copy of the additional abstract of record filed by the appellant on the 27th day of June, A. D. 1934, in the case of Illinois Brick Co., a Corporation, Appellee, vs. The Pennsylvania Railroad Company, a Corporation, Appellant, in said Appellate Court.

I further certify that the foregoing pages 301 to 331 inclusive are a true copy and complete transcript of the record of proceedings of said Appellate Court in the case of Illinois Brick Co., a Corp., Appellee, vs. The Pennsylvania Railroad Co., a Corp., Appellant, of record in my office, and also of the opinion of said Appellate Court rendered herein and filed in said cause on the 24th day of December, A. D. 1934, and also a certified copy of the order of the Supreme Court of Illinois transferring said cause to the Appellate Court which was filed in said Court on the 7th day of May, A. D. 1934, and also a certified copy of the order of the Supreme Court denying the Writ of Certiorari in said cause which was filed in said Appellate Court on the 22nd day of April, A. D. 1935, in said cause, as all of the same now appear on file in my office.

In testimony whereof I have set my hand and affixed the seal of said Appellate Court of Illinois, First District, at Chicago, Illinois, this 24th day of June, in the year of Our Lord One Thousand Nine Hundred and Thirty-five.

Sheldon W. Govier, Clerk of the Appellate Court, First District, Illinois. (Seal Appellate Court of Illinois, First District.)

[fol. 333] IN SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI TO APPELLATE COURT OF THE STATE OF ILLINOIS—Filed July 11, 1935

Upon consideration of the petition of counsel for The Pennsylvania Railroad Company, petitioner in the above entitled matter, and good cause therefor having been shown—

It is now here this 11th day of July, 1935, ordered that the time within which petition for writ of certiorari may be filed be and the same is hereby extended to and including the 16th day of August, 1935.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

[fol. 333a] [File endorsement omitted.]

[fol. 333b] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935.

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, First District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 334] IN SUPREME COURT OF THE UNITED STATES

STIPULATION FOR DIMINUTION OF THE RECORD—Filed Nov. 15, 1935

It is hereby stipulated by and between Pennsylvania Railroad Company, Petitioner, by Frederic D. McKenney, Frank J. Loesch and Edward M. Burke, its attorneys, and Illinois Brick Company, Respondent, by Abraham R.

Miller, its attorney, that the printed abstract record heretofore filed by petitioner at the time of filing petition for writ of certiorari shall, upon reprinting by the Clerk of the Supreme Court of the United States, be further reduced and altered as follows:

1. Delete the last sentence on page 49, reading as follows:

"The detail of the aforesaid statements was and is as follows:"

Delete pages 50 to 70, both inclusive.

[fol. 335] 2. Delete page 126 and substitute in lieu therof the following:

"No. 11395. The Gary Sand-Lime Brick Company v. James C. Davis, Director General of Railroads, as Agent, et al."

Delete page 127 and substitute in lieu thereof the following:

"No. 11314. Builders Brick Company and National Brick Company v. James C. Davis, Director General of Railroads, as Agent, et al."

3. Delete the words:

"My name is Eli B. Felsenthal."

on page 194, and all that follows said sentence down to and including the words:

"I am taking into consideration all the work that will have to be done before recovery."

on page 195; and substitute in lieu thereof the following:

"Eli B. Felsenthal testified solely concerning plaintiff's attorney's fees."

4. Delete the words:

"appearing on page 233 to page 252 of the transcript of the record and hereinbefore in this abstract set forth in haec verba. (Rec., 233, 235, 237, 239, 241, 242½; Abst., 50, 52, 54, 56, 58, 60.)"

on page 199 and substitute the words:

"heretofore referred to."

5. Delete the words:

"Direct Examination."

on page 206, and all that follows down to and including the words:

"I am averaging up the services of the law clerks as well as other lawyers' services and my own services."

[fol. 336] on page 208, and substitute in lieu thereof the following:

"A. R. Miller testified solely concerning plaintiff's attorney's fees."

6. Delete the words:

"Direct Examination."

on page 209, and all that follows down to and including the words:

"(Defendant's objection overruled and defendant's motion to strike answer as not being responsive denied.)"

on page 210, and substitute in lieu thereof the following:

"Eli Felsenthal testified further solely concerning plaintiff's attorney's fees."

7. Delete the words:

"Potter, Commissioner, concurring:"

on page 255, and all that follows down to and including the words:

"for that reason I dissent."

in the seventeenth line from the top on page 264; and substitute in lieu thereof the following:

"Potter, Commissioner, concurring opinion. Hall, Commissioner, dissenting opinion. Daniels, Commissioner, dis-

senting opinion. Eastman, Commissioner, dissenting opinion. Campbell, Commissioner, dissenting opinion."

Frederic D. McKenney, Frank J. Loesch, Edward M. Burke, Attorneys for Petitioner. Abraham R. Miller, Attorney for Respondent.

[fol. 337] [File endorsement omitted.]

Endorsed on cover: File No. 39,914. Illinois Appellate Court, First District. Term No. 360. Pennsylvania Railroad Company, petitioner, vs. Illinois Brick Company. Petition for a writ of certiorari and exhibit thereto. Filed August 12, 1935. Term No. 360, O. T., 1935.

FILE COPY

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 360

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF.

FREDERIC D. MCKENNEY,
FRANK J. LOESCH,
EDWARD M. BURKE,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No.

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

MAY IT PLEASE THE COURT:

Pennsylvania Railroad Company prays that a writ of certiorari issue to review the judgment of the Appellate Court of the State of Illinois, First District, entered in the above entitled cause on December 24, A. D. 1934. (R. 306).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Questions Presented.

1. Whether the Illinois Commerce Commission has the power, under Sections 13 and 15a of the Interstate Commerce Act (49 U. S. C. A., Sections 13 and 15a), under Section 208a of the Transportation Act, 1920, and under the provision of Section 8 of Article I of the Constitution of the United States giving exclusive authority to Congress over interstate commerce, to award reparation in favor of a shipper and against a railroad in the following circumstances: Said railroad was engaged in interstate and intrastate commerce. Reparation was awarded on account of alleged unreasonable and discriminatory charges for shipments of common brick in intrastate commerce in Illinois between October 28, 1920, and February 15, 1922. The United States Railroad Administration had established a specific rate on brick during Federal control. Said rate was continued in effect by Section 208a of the Transportation Act, 1920. Part of the rates here in question were established pursuant to a mandatory general order of the Interstate Commerce Commission requiring said railroad to establish intrastate rates in Illinois on all commodities equal to the interstate rates on all commodities theretofore established by the Interstate Commerce Commission in *Ex Parte* 74, a proceeding authorizing increase of such interstate rates by a certain percentage. The rate established by the Illinois Commerce Commission in the reparation proceeding was not only lower than the rates established pursuant to the said mandatory order of the Interstate Commerce Commission, but was also lower than the above mentioned specific rate on brick prescribed by

the Railroad Administration, which was continued in force by said Section 208a.

2. Whether an award of reparation by the Illinois Commerce Commission denied petitioner due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and imposed an unlawful burden on interstate commerce, in violation of Section 8 of Article I of the Constitution of the United States, in the following circumstances: Said railroad was engaged in interstate and intrastate commerce. Reparation was awarded on account of alleged unreasonable and discriminatory charges for shipments of common brick in intrastate commerce in Illinois between October 28, 1920, and February 15, 1922. The United States Railroad Administration had established a specific rate on brick during Federal control. Said rate was continued in effect by Section 208a of the Transportation Act, 1920, and part of the rates here in question were established pursuant to orders of the Illinois Public Utilities Commission authorizing said railroad to increase its rates on all commodities in Illinois by certain percentages. The rates established by the Illinois Commerce Commission (successor to Illinois Public Utilities Commission) in the reparation proceeding were not only lower than the rates authorized by said percentage increases, but were also lower than the specific rate on brick prescribed by the Railroad Administration and continued in force by said Section 208a. This question must be considered in the light of the fact that there were no decisions in the Illinois courts prior to the present proceedings giving the Illinois Commerce Commission such power to award reparation on an approved rate.

3. Whether an order of the Illinois Commerce Commission awarding reparation to respondent against petitioner on account of alleged unreasonable and discriminatory charges for intrastate shipments of freight, denies peti-

tioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, when said order thus retroactively establishes a rate for such shipments which is less than petitioner's cost of moving such shipments, as shown by the undisputed evidence before said Commission.

4. Whether petitioner has been deprived of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, because it was deprived of an opportunity to be heard on the merits in this case by the state court, in the following circumstances: Prior to the hearing before the Illinois Commerce Commission in this case, the Illinois Supreme Court had held that Section 68 of the Illinois Public Utilities Act (Cahill's Illinois Statutes, Chapter 111a, Section 87; Smith-Hurd Illinois Statutes, Chapter 111⅔, Section 72) did not permit an appeal to the courts by a carrier from an order of the Illinois Public Utilities Commission awarding reparation against said carrier, because such award was not a final order, but was open to inquiry in a subsequent suit on the award. Consequently petitioner did not attempt to appeal either from the order of the Illinois Commerce Commission entered November 7, 1923, in this case, finding that certain rates would have been reasonable and that reparation should be awarded, nor from the order entered April 16, 1924, awarding reparation. After the time for appeal had expired, respondent sued on the award and obtained judgment in the trial court. Petitioner appealed, and on appeal respondent contended for the first time that petitioner should have appealed from said order entered November 7, 1923, by said Commission. The Appellate Court of Illinois sustained this contention, and held that under said Section 68 petitioner, by failing to appeal, had waived the right to be heard in court as to the sufficiency of the evidence before the Commission, or its findings. The

Supreme Court of Illinois, by denial of certiorari, in effect approved the Appellate Court's holding.

Statutes Involved.

Section 13 (4) of Interstate Commerce Act, as amended by Transportation Act, 1920, c. 91, Section 416 (41 Stat. 484 [49 U. S. C. A. Section 13, Paragraph (4)]):

> "*Duty of commission where State regulations result in discrimination.* Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 15a (2) of Interstate Commerce Act, as amended by Transportation Act, 1920, c. 91, Section 422 (41 Stat. 488 [49 U. S. C. A. Section 15a (2)]):

> "*Rates to Permit Carriers to Earn Fair Return.* In the exercise of its power to prescribe just and reasonable rates the commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate

annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different portions of the country."

Section 208a of Transportation Act, 1920, c. 91 (41 Stat. 464 [Fed. Stat. Ann., Supp. 1920, page 80]):

"All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission."

Section 68 of "An Act Concerning Public Utilities," (Laws of Illinois, 52d General Assembly, 1921, page 742 [Cahill's Illinois Statutes, 1923, chapter 111a, section 87; Smith-Hurd Illinois Statutes, 1923, chapter 111-2/3, section 72]). Said section is in part as follows:

"Within thirty days after the service of any order or decision of the Commission refusing an application for a rehearing of any rule, regulation, order or decision of the Commission, or within thirty days after the service of any final order or decision of the Commission upon and after a rehearing on any rule, regulation, order or decision of the Commission, any person or corporation affected by such rule, regulation, order or decision, may appeal to the circuit or superior court of the county in which the subject-matter of the hearing is situated, * * *

"When no appeal is taken from a rule, regulation, order or decision of the Commission, as herein pro-

vided, parties affected by such rule, regulation, order or decision, shall be deemed to have waived the right to have the merits of said controversy reviewed by a court and there shall be no trial of the merits of any controversy in which such rule, regulation, order or decision was made, by any court to which application may be made for a writ to enforce the same, or in any other judicial proceeding."

Section 72 of "An Act Concerning Public Utilities," (Laws of Illinois, 52d General Assembly, 1921, page 745 [Cahill's Illinois Statutes, 1923, chapter 111a, section 91; Smith-Hurd Illinois Statutes, 1923, chapter 111-2/3, section 76]):

"When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

"If the public utility does not comply with an order of the Commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in any court of competent jurisdiction a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the order of the Commission shall be *prima facie* evidence of the facts therein stated. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the action.

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the product, commodity or service as to which complaint is made was furnished or performed, and a petition for the enforcement of an order of the Commission for the payment of money shall be filed in the

proper court within one year from the date of the order.

"The remedy provided in this section shall be cumulative, and in addition to any other remedy or remedies in this Act provided in case of failure of a public utility to obey a rule, regulation, order or decision of the Commission.

"The Commission shall have power to receive complaints regarding loss or damage occasioned by a public utility, and to make inquiry as to the methods of adjusting such claims. All claims against any public utility for loss of, or damage to property, or for any other loss or damage, in connection with a public utility service, not covered by the preceding paragraphs of this section, if not acted upon within ninety days from the date of the filing of the claim with the public utility, may be investigated by the Commission, in its discretion, and the results of such investigation shall be embodied in a special report which shall be open to public inspection."

Section 118 of "An Act in Relation to Practice and Procedure in Courts of Record", in force July 1, 1907, as amended (Laws of Illinois, 45th General Assembly, 1907, page 467 [Cahill's Illinois Statutes, 1931, chapter 110, section 118; Smith-Hurd Illinois Statutes, 1931, chapter 110, section 118]). Said section is in part as follows:

"Appeals from and writs of error to circuit courts, the superior court of Cook county, the criminal court of Cook county, county courts and city courts, in all criminal cases below the grade of felony shall be taken directly to the Appellate Court, and in all criminal cases above the grade of misdemeanors and cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved; and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue, or in which the State is interested, as a party or otherwise, shall be taken directly to the Supreme Court. * * *"

Section 121 of said Practice Act, as amended by Act of June 21, 1929 (Laws of Illinois, 45th General Assembly,

1907, page 468; Laws of Illinois, 56th General Assembly, 1929, page 578 [Cahill's Illinois Statutes, 1931, chapter 110, section 120; Smith-Hurd Illinois Statutes, 1931, chapter 110, section 120]). Said section is in part as follows:

> "In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: [1] In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. [2] In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court, for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court: • • •"

Statement.

The Appellate Court of Illinois, First District, affirmed a judgment entered by the Circuit Court of Cook County, Illinois, in the amount of $42,428.09 plus court costs, including $2,000.00 allowed as attorneys' fees, entered by said Circuit Court in favor of respondent, Illinois Brick Company, and against petitioner, Pennsylvania Railroad Company. Respondent sued on an award of reparation granted it by the Illinois Commerce Commission against Pennsylvania Railroad Company and Pittsburgh, Cincin-

nati, Chicago & St. Louis Railroad Company. The award of the Commission was based on alleged unreasonableness and discrimination in the rates charged respondent by said two railroad companies for shipments of common brick over their lines from Bernice, Illinois, to Illinois points within the Chicago Switching District, between October 28, 1920, and February 15, 1922. The ground of the alleged unreasonableness and discrimination was that the rates in question, which had previously been the same as rates from certain nearby points, were, during the period for which reparation was awarded, raised much higher than the rates from said nearby points.

Bernice is located about two miles outside the limits of the Chicago Switching District (R. 80). The limits of the said switching district were not otherwise defined either before the trial court (R. 20; 194-266), or before the Commission (R. 72-110). The said rates from Bernice were compared by the Commission with the rates from points inside the switching district to intrastate destinations within the switching district (R. 44-46).

Prior to June 25, 1918, the rate on common brick from Bernice to destinations on the same railroad within the switching district was 25c per ton (R. 44). The same rate prevailed on shipments of common brick between intrastate points within the district (R. 44). On June 25, 1918, General Order Number 28 of the Director General of Railroads became effective (R. 44). That order provided that interstate and intrastate freight rates generally should be raised 25%, but provided specifically that the rate on brick should be raised 2c per one hundred pounds, or 40c per ton (R. 76). General Order Number 28 also provided that in applying rates, fractions should be disposed of as follows: Amounts of 5c or greater, but less than 10c, to be increased to 10c. Thereby the rates from Bernice to points within the switching district and the rates between points

within the switching district were raised to 70c per ton (R. 44).

On October 19, 1918, Freight Rate Authority 1887, issued by the Director General of Railroads, became effective (R. 44). This order changed the advance on brick moving between points within the switching district from 2c per hundred pounds, or 40c per ton, to an increase of 25% over the rates prevailing prior to June 25, 1918, but left the rates from points without the switching district to points within the switching district as they were (R. 76-77). Thereby, the rate on brick from Bernice to destinations within the switching district remained 70c, whereas the rates from points within the district to destinations within the district became 30c (R. 44-45).

Respondent Illinois Brick Company took the matter of this difference in rates up with the various carriers serving the yards outside the switching district with a view of having the rates from points outside the district to points within the district reduced to a parallel with the rates inside the district, *i. e.*, from 70c per ton to 30c per ton (R. 77). The carriers filed petitions with the rate committees for permission to do this, and these petitions were approved by the rate committees but were denied by the Director General of Railroads (R. 77).

The rates of 70c and 30c, respectively, remained in effect on February 29, 1920, the effective date of the Transportation Act, 1920. By Section 208 (a) of that Act the existing rates on both intrastate and interstate freight were continued in effect "until thereafter changed by state or federal authority * * *." It was provided by said Section that before September 1, 1920, such rates should not be reduced without approval by the Interstate Commerce Commission.

On July 29, 1920, an order of the Interstate Commerce

Commission in *Ex Parte* 74, 58 Int. Com. Rep. 220 (R. 281-300), was entered, effective August 26, 1920. This order raised the interstate rates from and to points in Illinois by 40% over the rates then prevailing (R. 89). On August 10, 1920, the Illinois Public Utilities Commission (predecessor of Illinois Commerce Commission) entered an order in its case 10620, authorizing a general increase of intrastate freight rates in Illinois by 33⅓% (7 Illinois Pub. Ut. Com. Rep. 1047) (R. 216). Pursuant to this order the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company established a rate of 93½c on brick from Bernice to Illinois points within the Chicago Switching District, and a rate of 40c between Illinois points within the Chicago Switching District (R. 113). By supplement to this order, the Illinois Public Utilities Commission in November, 1920, authorized an increase of 35%, instead of 33⅓%, as previously ordered (8 Illinois Pub. Ut. Com. Rep. 31). This supplement increased the said rate of 93½c to 94½c, and increased the said rate of 40c to 40½c (R. 45).

Part of the Chicago Switching District is within the State of Illinois, and part is in Indiana (R. 117). Therefore, there were in effect two rates between points within the switching district, one interstate and one intrastate. There also were in effect two rates between Bernice and points within the switching district, one interstate and one intrastate. The higher rate in each case was established for interstate commerce by the 40% increase in *Ex Parte* 74 (R. 296). The lower rate in each case was established for intrastate commerce by the 35% increase granted by the Illinois Public Utilities Commission in the supplement to case number 10620. On January 11, 1921, the Interstate Commerce Commission in *Re Intrastate Rates within the State of Illinois,* Docket 11703, 60 Int. Com. Rep. 92 (R. 218-236), entered an order requiring the said railroads, together with

others, to raise intrastate freight rates in Illinois 40% over the level in effect prior to July 29, 1920, the date of the entry of the order of the Interstate Commerce Commission in *Ex Parte* 74. The effect of the order in Docket 11703 was to raise intrastate freight rates in Illinois to the level of the interstate freight rates established in *Ex Parte* 74 (R. 46). By virtue of said order in Docket 11703, the rate on brick from Bernice to Illinois points within the switching district was increased from 94½c to 98c, and the rate between Illinois points within the switching district was increased from 40½c to 42c (R. 46).

Respondent herein brought a proceeding entitled *Illinois Brick Company* v. *Director General, as Agent, Pennsylvania Railroad, Western Lines*, Docket 11317, 64 Int. Com. Rep. 273 (R. 116-129), before the Interstate Commerce Commission, seeking reparation on account of the rate of 70c per ton charged on shipments of brick from Bernice to interstate and intrastate points within the Chicago Switching District since June 25, 1918. The Interstate Commerce Commission restricted its decision to shipments from Bernice to *interstate* destinations within the switching district, and held that a rate of 70c per ton on such shipments was not unreasonable, but that the rate should not exceed the interstate rates between points within the switching district by more than 10c per ton (R. 125). In spite of the fact that the rate from Bernice to interstate points within the district had exceeded the interstate rates between points within the district by 40c per ton during the entire period in question, reparation was refused. (R. 125). The effective date of the new rates was set for February 16, 1922, the day after the period for which reparation is sought in the instant case ends (R. 128).

On February 16, 1922, after the entry of this order, petitioner and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company reduced their rates on brick from Ber-

nice to both interstate and intrastate points within the switching district to 50¢ per ton (R. 46; 90).

On October 28, 1922, Illinois Brick Company filed its petition for reparation, which is the basis of the instant case, before the Illinois Commerce Commission (R. 20-27). By said petition Illinois Brick Company sought reparation from Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company because of alleged unreasonable and unjustly discriminatory rates between Bernice, Illinois, and intrastate destinations within the Chicago Switching District from October 28, 1920, to February 15, 1922. After a hearing, the Commission entered an order on November 7, 1923 (R. 42-49). In that order the Commission first found that the plants of the Illinois Brick Company at Bernice, Illinois, compete with other brick plants located in the Chicago Switching District for business in the Chicago market (R. 43); that the products of some of the brick plants in the Chicago Switching District undergo no railroad transportation, as their product is delivered by team or truck (R. 43-44); and that the most important competition that the plants outside the district meet appears to be with the plants at Blue Island and Riverdale (R. 44). The Commission then reviewed the history of the rates, and the various rate orders which have heretofore been set forth (R. 44-46). After concluding this review, the Commission stated that it would be observed from the history of the rates that the parity between the brick producing plants had been seriously disturbed, and that it was not until after the Interstate Commerce Commission entered its order in Docket 11317 (*Illinois Brick Company, et al.* v. *Director General, as Agent, et al.*) that the parity of the rates was restored (R. 46). The Commission further found that the distances involved from the plants within the district range from 13 to 22 miles, and from the plants outside of the district, 21 to 30 miles (R.

46). The Commission stated that the disturbance of the parity arose by reason of the increase ordered by the Director General of 40c per ton on brick instead of 25%; that it apparently was not anticipated that the switching rates for the transportation of brick should be increased by 40c as other switching rates were only increased 25%; that this is borne out by the fact that on October 19, 1918, the Railroad Administration authorized a reduction in switching rates from 40c to 25%; and that at this time apparently no consideration was given to the relationship in the rates here considered nor to the competitive conditions (R. 47). On the basis of the foregoing statements the Commission concluded as follows (R. 47-48):

> "The defendants in their effort to justify the rates attacked introduced a cost study. Making all due allowances for the disputed items of cost, it is clear that the rate of 30 cents per ton does not produce sufficient revenue to pay operating expenses. It is also clear from the cost study that the rate of 50 cents per ton for single line application at the time the shipments here under consideration moved, provides adequate revenue for the transportation of brick from Bernice, Illinois, to points of destination within the Chicago switching district and intermediate points covered by this complaint.
>
> "We find that to the extent that the rates here complained of exceed by more than 10 cents per ton the rates contemporaneously applied between points within the Chicago switching district, the rates from Lansing, Illinois, were unjustly discriminatory.
>
> "Giving due consideration to the development of all of the rates from all brick producing plants within the Chicago switching district and points immediately beyond the said switching district, the services performed and the conditions under which such services were performed we find that the complainant has been damaged to the extent that the charges assessed are greater than the charges that would have been assessed had the said charges been predicated on a rate of 50 cents per ton, minimum 60,000 pounds per car."

The Commission accordingly ordered that the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company and the Pennsylvania Railroad Company severally file with the Commission, within 60 days, a statement of reparation due under the findings (R. 48); and that the Commission reserve jurisdiction for the purpose of entering an order awarding reparation for charges collected in excess of the rates found to be free from discrimination (R. 49).

No appeal was taken from this order by the railroad companies.

On December 31, 1923, the Illinois Brick Company filed statements purporting to show the reparation due. The statements showed reparation due from the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company of $7,095.82 (R. 60), and from the Pennsylvania Railroad Company of $21,869.90 (R. 70). No further proceedings were had until the order of the Commission entered April 16, 1924 (R. 71-72).

In the order of April 16, 1924, the Commission found that on November 7, 1923, it had entered its report, findings and order and reserved jurisdiction for the purpose of awarding reparation for charges collected in excess of rates found to be just and reasonable in said order; that a statement certified by the Auditor of the Pennsylvania Railroad Company had been filed which showed the amount of reparation to be $28,965.72; that the amount of reparation due was stipulated to be the amount due; that complainant was entitled to reparation in said amount for excessive freight charges collected from it by Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (now Pennsylvania Railroad Company) (R. 7). It was therefore ordered that Pennsylvania Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (now Pennsylvania Railroad Company) were directed to pay to

complainant before May 1, 1924, $28,965.72 and interest, on account of unreasonable rates (R. 71-72).

As above stated, the Commission found on November 7, 1923, that it was clear from the cost study of the defendants that a rate of 50c per ton at the time the shipments moved provided adequate revenue (R. 47). The only evidence in the record as to cost was the cost study mentioned and this cost study did not support the conclusion reached. One of the defendant's witnesses was an expert who had made the cost study of the costs of moving this freight (R. 103-110). He described the method by which the cost study was made up (R. 103-108). The cost study formula was received in evidence (R. 134-188). The witness concluded from his study that the terminal cost was 44.4 cents per ton (R. 108). To this he applied an operating ratio of 66⅔% to take care of omitted expenses, taxes, interest on indebtedness, etc., making a total cost of 66.6 cents per ton (R. 108). He further gave as his opinion that the road haul cost from Bernice would be 30 cents per ton, although this was not based on the cost study (R. 108). No attempt was made on cross examination to show that the cost figures were incorrect (R. 109-110). The cost study, as interpreted by the witness, therefore stands as undisputed evidence that the cost of moving the freight in question was more than 96.6c per ton, and thus greatly in excess of the rate of 50c per ton fixed by the Illinois Commerce Commission.

The defendant railroads did not pay the amount of the reparation, and Illinois Brick Company filed suit on the award against both railroad companies in the Circuit Court of Cook County, Illinois, pursuant to Section 72 of the Illinois Public Utilities Act, which authorizes suits on awards of reparation (Cahill's Illinois Statutes, chapter 111a, section 91; Smith-Hurd's Illinois Statutes, chapter 111⅔, section 76.)

Defendant railroad companies filed with their pleas of nonassumpsit and not guilty, pursuant to the state practice, a notice of special defenses, which stated, among other things, that the rates in question were published and collected by them in obedience to an order entered January 11, 1921, by Interstate Commerce Commission in number 11703 (*Re Intrastate Rates within the State of Illinois*) (R. 16), and "that Illinois Commerce Commission is without jurisdiction or authority to penalize said defendants or to award damages or reparation against them for their said acts pursuant and in obedience to said order of Interstate Commerce Commission and that this court is likewise without such jurisdiction and authority;" (R. 17). Defendants also relied in said notice of special defenses on the decision of the Interstate Commerce Commission in number 11317 (*Illinois Brick Company, et al.*, v. *Director General, as agent, et al.*). (R. 15-16).

On the trial before the court without a jury, Illinois Brick Company introduced the complete record before the Illinois Commerce Commission (R. 20), and certain other evidence not here material (R. 194-210; 237-244; 247-265). Defendant introduced certified copies of the order of the Illinois Commerce Commission in number 10620, which authorized the raising of the intrastate rates 33⅓% (R. 210-217), to which order was attached a copy of the report of the Interstate Commerce Commission in *Ex Parte* 74, authorizing the raising of Illinois interstate rates 40% (R. 281-300); and the opinion and order of the Interstate Commerce Commission in *Re Intrastate Rates in the State of Illinois*, Docket 11703 (R. 217-236).

Rulings of the Courts Below.

The trial court overruled defendants' motion to find the issues for defendants at the close of plaintiff's evidence (R. 210), and at the close of all the evidence (R. 266); and denied defendants' motion in arrest of judgment (R. 19). The court permitted plaintiff to dismiss the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company as a party defendant (R. 266). It found the issues for the plaintiff (R. 267), and entered judgment against the Pennsylvania Railroad Company alone, for $28,673.02, plus interest, making a total of $42,428.09, plus costs, including an attorneys' fee of $2,000.00 (R. 269). Defendant Pennsylvania Railroad Company excepted to the foregoing orders, finding and judgment (R. 269).

Pennsylvania Railroad Company appealed to the Illinois Supreme Court on the ground that constitutional questions were involved, pursuant to Section 118 of the Illinois Statute, "An Act in Relation to Practice and Procedure in Courts of Record", as amended, (Cahill's Illinois Statutes, 1931, chapter 110, section 118; Smith-Hurd's Illinois Statutes, 1931, chapter 110, section 118). (R. 269). Pennsylvania Railroad Company assigned error on the grounds that the finding, judgment, and orders of the trial court imposed an unlawful burden on interstate commerce in violation of Section 8, Article I, of the Constitution of the United States (R. 270); deprived Pennsylvania Railroad Company of property without due process of law in violation of Section 1 of the 14th Amendment (R. 270); denied it the equal protection of the laws in violation of said 14th Amendment (R. 270); deprived it of its rights under Section 8 of Article I of the Constitution of the United States (R. 271); that the Interstate Commerce Commission having assumed jurisdiction over the rate in question, the Illinois Commerce Commission's action in awarding repara-

tion was unlawful and void and the judgment of the court approving said action was error (R. 271); that the Illinois Commerce Commission did not have jurisdiction or power to award reparation when to do so it was required to change or reduce a rate previously approved by it (R. 272); and that the evidence before the Illinois Commerce Commission did not warrant its findings (R. 272).

The Supreme Court of Illinois found that the case had been wrongfully appealed to that court and, without filing an opinion, ordered that the case be transferred to the Appellate Court of Illinois, First District (R. 303). By the entry of this order the Supreme Court of Illinois necessarily held that the constitutional questions urged had not been properly raised in the court below, although no such finding appears of record. On oral argument of the case before the Supreme Court of Illinois the Chief Justice thereof stated that the case would be transferred to the Appellate Court of Illinois, First District, because of the Pennsylvania Railroad Company's failure to properly raise and preserve in the trial court the constitutional questions urged in the Supreme Court. Three days after the oral argument, the Pennsylvania Railroad Company moved the Supreme Court to file a written opinion, or oral opinion reduced to writing and filed in the case, stating the reasons why the case was transferred to the said Appellate Court. The Supreme Court of Illinois refused to consider said motion or permit it to be filed.

The Appellate Court of Illinois, First District, in its opinion, held that the order of the Illinois Commerce Commission, entered November 7, 1923, finally determined the "just and reasonable" rate, "past and future"; that it was "legislative" in character and appealable; and that since defendant had not appealed, defendant was precluded under Section 68 of the Illinois Public Utilities Act (Cahill's Illinois Statutes, chapter 111a, section 87; Smith-

Hurd's Illinois Statutes, chaper 111½, section 72) from contesting the order of November 7, 1923 on the merits in a suit based on the subsequent reparation award of April 16, 1924 (R. 319). The court also said that, nevertheless, it had examined the evidence and thought it sufficient to sustain the findings, and had examined the findings and held the same justified the order for reparation (R. 319). It held that the reports and orders of the Interstate Commerce Commission in *Illinois Brick Company, et al.* v. *Director General, as Agent, et al.*, Docket 11317; *Ex Parte* 74; and *Re Intrastate Rates Within the State of Illinois*, Docket 11703, did not preclude the Illinois Commerce Commission from awarding reparation in this case (R. 317). It held that the order of the Illinois Public Utilities Commission in Docket 10620 did not preclude the award of reparation (R. 317). It, therefore, affirmed the judgment of the trial court (R. 306). Pennsylvania Railroad Company filed a petition for rehearing which the Appellate Court denied, but the court ordered that the opinion be "slightly modified" (R. 306-307). The record does not disclose how the opinion was modified. The petition for rehearing did not set up any constitutional questions, since under Section 118 of the Illinois Statute, "An Act in Relation to Practice and Procedure in Courts of Record", as amended, (Cahill's Illinois Statutes, 1931, chapter 110, section 118; Smith-Hurd's Illinois Statutes, 1931, chapter 110, section 118), the Appellate Court of Illinois had no jurisdiction over constitutional questions.

Pennsylvania Railroad Company petitioned the Supreme Court of Illinois for a writ of certiorari to the Appellate Court, pursuant to the provisions of Section 121 of said Practice Art, (Cahill's Illinois Statutes, 1931, chapter 110, section 120; Smith-Hurd's Illinois Statutes, 1931, chapter 110, section 120). Pennsylvania Railroad Company assigned as error the constitutional grounds assigned as error

on the first appeal as hereinbefore stated, and in addition assigned as error that the Appellate Court's holding that Pennsylvania Railroad Company should have appealed, and because of its failure to appeal Section 68 of the Illinois Public Utilities Act prevented review of the sufficiency of the findings and evidence before the Illinois Commerce Commission, denied Pennsylvania Railroad Company due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States, and imposed an unlawful burden on interstate commerce in violation of Section 8, Article I, of the Constitution of the United States (Appendix, p. 49). The Supreme Court of Illinois denied the petition for a writ of certiorari without filing an opinion (R. 308), thereby making the judgment of the Appellate Court of Illinois, First District, final under said Section 121. Pennsylvania Railroad Company then filed its petition in the Supreme Court of the United States for a writ of certiorari to the Appellate Court of Illinois, First District.

REASONS FOR GRANTING PETITION.

I. The Appellate Court of Illinois held in this case that the Illinois Commerce Commission could award reparation on Illinois intrastate shipments, although the Interstate Commerce Commission in *Re Intrastate Rates in the State of Illinois, Docket* 11703, 60 Int. Com. Rep. 92 (R. 218-236), had ordered defendant to increase all Illinois intrastate freight rates for the period in question to the same extent interstate rates were increased in *Ex Parte* 74 (an Interstate Commerce Commission order), and defendant had done so (R. 45-46). This Court, in *Railroad Commission of Wisconsin* v. *Chicago, Burlington and Quincy Railroad Company,* 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, held that when the Interstate Commerce Commission had ordered carriers to increase all intrastate passenger rates to the same extent interstate passenger rates were increased in *Ex Parte* 74, such carriers might enjoin the state commission and state officials from interfering with fares so increased. The decision of the state court is probably not in accord with that applicable decision of this court. The precise issue here, relating to the power of the state commission to award reparation on rates directed by the Interstate Commerce Commission, presents a Federal question of substance not heretofore decided by this court. The authority and construction of Sections 13 and 15a of the Interstate Commerce Act, Section 208a of the Transportation Act, 1920, and the commerce clause of the Federal constitution are involved.

II. The Appellate Court of Illinois held in this case that a general order of the Illinois Public Utilities Commission authorizing intrastate rates to be raised by a certain percentage over pre-existing rates did not prevent its successor, the Illinois Commerce Commission, from awarding

reparation on a specific rate, for the period said authorized increase was in effect, sufficient not only to eliminate the increase, but also to reduce the rate below said pre-existing rate. There were no decisions in Illinois courts prior to the present proceedings giving the Illinois Commerce Commission such power. Whether a state commission may thus overthrow rates lawfully established, and take away money lawfully collected years before, without taking property without due process of law in violation of the Fourteenth Amendment and imposing an unlawful burden on interstate commerce, presents a Federal question of substance not heretofore decided by this court.

III. The Appellate Court of Illinois said in this case that it had examined the evidence before the Commission and thought it sufficient to sustain the findings. (R. 319). The Commission found that Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company had introduced a cost study, and that it was clear "from the cost study" that a rate of 50 cents per ton for single line application provides adequate revenue for the movement in question (R. 47). It made no findings questioning any of the elements of cost in the cost study. The undisputed testimony of the railroads' expert witness, based on the said cost study, was that the cost of moving the freight in question exceeded 96.6 cents per ton. There was no further evidence, either contrary or otherwise, as to the cost of moving the freight. This court in *Northern Pacific Railway Company* v. *Department of Public Works of Washington,* 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412, held that an order fixing railroad rates, entered by an administrative tribunal and based on a finding made without evidence or upon evidence which clearly does not support it, is an arbitrary act against which courts afford relief and is a denial of due process. The decision of the state

court is probably not in accord with that applicable decision of this court.

IV. The Appellate Court of Illinois has in effect overruled the previous decision in Illinois, which held that no appeal lay from an order of the Illinois Commerce Commission awarding reparation. By such decision of the Appellate Court petitioner has been denied an opportunity to be heard by the courts on the sufficiency of said Commission's findings and the evidence before it in this case. In *The Terminal Railroad Association of St. Louis* v. *The Public Utilities Commission,* 304 Ill. 312, 136 N. E. 797, the Supreme Court of Illinois held, prior to the hearing before the Illinois Commerce Commission in this case, that appeal to the courts lay only from *final* orders of the Illinois Public Utilities Commission (now Illinois Commerce Commission), and that an award of reparation was not such a final and appealable order, because in a suit on the award the carrier is free to open the entire record and procure a judgment of the court in its favor. In the instant case the Appellate Court of Illinois has held that petitioner should have appealed from the order of the Illinois Commerce Commission entered November 7, 1923, finding the rates attacked discriminatory and reserving jurisdiction to award reparation, and by failing to do so it has waived the right to be heard on the merits (R. 319). The Appellate Court admitted that under *The Terminal Railroad Association* case, *supra,* the final order of April 16, 1924, was not appealable, but held that the interlocutory order of November 7, 1923, was appealable. At the time of the Appellate Court's decision, the time for appeal from the Commission had long expired. This court in *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, held that when a state court originally holds that the state tax commission has no jurisdiction to correct inequality of taxes, and a taxpayer in reliance on

that decision fails to apply to said commission for relief, a subsequent decision by the court that the commission does have such jurisdiction, and the taxpayer has no right in equity because of his failure to apply to the commission, denies said taxpayer due process of law. The decision of the state court is probably not in accord with that applicable decision of this court.

CONCLUSION.

For these reasons it is respectfully submitted that this petition should be granted.

FREDERIC D. MCKENNEY,
FRANK J. LOESCH,
EDWARD M. BURKE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. .....

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

One opinion was delivered by the Appellate Court of Illinois, First District. No opinion was delivered by the Supreme Court of Illinois, either on the first appeal or on petition for writ of certiorari to the Appellate Court of Illinois, First District. The opinion of the Appellate Court of Illinois, First District, is not reported but is set forth in full in the Record, pages 310 to 322.

JURISDICTION.

The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code, as amended by the act of February 13, 1925, c. 229 (43 Stat. 937 (28 U. S. C. A., section 344)). The judgment of the Appellate Court of Illinois, First District, which is here sought to be reviewed, was entered December 24, 1934. (R. 305-306). Petition for rehearing was denied January 28, 1935 (R. 306-307). Petition to the Supreme Court of Illinois for a writ of certiorari to review the judgment of said Appellate Court was denied by said Supreme Court April 16, 1935 (R. 308). Petition to the Supreme Court of the United States for writ of certiorari was filed within ~~three months after April 16, 1935~~ statutory period as extended July 11th 1935 (R. 324)

The petition involves the correctness of the decision of the Appellate Court of Illinois, First District, and the validity of orders of the Illinois Commerce Commission entered November 7, 1923, and April 16, 1924, in the case of *Illinois Brick Company* v. *Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company* Case No. 12765; the validity of section 68 of "An Act Concerning Public Utilities"; and the validity of section 72 of said Act. Said orders of the Illinois Commerce Commission found reparation due and awarded reparation. They are too long to be set forth here, but appear in full in the Record (R. 42-49; 71-72). Said section 68 provides for appeals from the Illinois Commerce Commission, and the relevant parts of said section are set forth in the petition, p. 6. Said section 72 provides for suits on awards of reparation by said Commission, and is set forth in the petition, p. 7.

The decision of the Appellate Court of Illinois, First

District, was by the highest state court in which a decision could be had. Petitioner attempted to appeal directly from the trial court to the Supreme Court of Illinois, the highest state court, but said Supreme Court refused to hear the case and transferred it to the Appellate Court of Illinois, First District (R. 303). The Appellate Court then entered judgment affirming the trial court (R. 306). Petitioner could not then appeal to the Supreme Court of Illinois as of right but could only (a) petition the Supreme Court of Illinois for a writ of certiorari, or (b) petition the Appellate Court for a certificate of importance and appeal to the Supreme Court, under the governing Illinois statute (section 121 of "An Act in Relation to Practice and Procedure in Courts of Record," in force July 1, 1907, as amended, Petition, p. 8-9). Petitioner sought a writ of certiorari from the Supreme Court of Illinois, but the writ was denied (R. 308). This denial made the decision of said Appellate Court final under said section 121 of "An Act in Relation to Practice and Procedure in Courts of Record," as amended. This court has decided that under the Illinois practice petitioner had done everything necessary, and was not obligated also to petition for certificate of importance and appeal. *Chesapeake & Ohio Railway Company* v. *Mihas*, 280 U. S. 102, 74 L. Ed. 207, 50 S. Ct. 42.

The construction of Federal statutes involved in Question 1 (Petition, p. 2), and discussed in Point I of the brief (Brief, p. 37) is properly before this court. Petitioner, by notice of special defense, which was proper pleading under the Illinois practice (*Hunter* v. *Troup*, 226 Ill. App. 343), contended in the trial court that the rates in question were published and collected by petitioner in obedience to the order of the Interstate Commerce Commission in No. 11703; that Illinois Commerce Commission was without jurisdiction or authority to penalize petitioner or to award damages or reparation against it for

its said acts pursuant and in obedience to said order of Interstate Commerce Commission; and that the trial court was likewise without such jurisdiction or authority (R. 16-17). Petitioner also introduced in evidence before the trial court the report and order of the Interstate Commerce Commission in said No. 11703, entitled *Re Intrastate Rates Within the State of Illinois* (R. 217-237). The Appellate Court of Illinois referred to said Interstate Commerce Commission proceeding, Docket 11703, in its opinion (R. 314), and held that plaintiff (meaning Illinois Brick Company) was not precluded from recovering reparation by any prior order of the Interstate Commerce Commission (R. 317). This holding necessarily drew in question the construction and effect of said order of the Interstate Commerce Commission; the construction and effect of sections 13 and 15a of the Interstate Commerce Act, under the authority of which the Commission acted; and the construction and effect of section 208(a) of the Transportation Act, 1920, which continued in effect the rates on which the Interstate Commerce Commission based its order. Reference to a rate schedule filed with the Interstate Commerce Commission for justification of charges has been held by this court to set up a Federal right. *Atchison, Topeka & Santa Fe Railway Company* v. *Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 S. Ct. 556. Judgment for the plaintiff, Illinois Brick Company, could not have been sustained by said Appellate Court without deciding that said order of the Interstate Commerce Commission and said Federal statutes did not prevent its jurisdiction; and the Appellate Court did so decide.

The questions arising under the Federal constitution stated in Questions 1, 2 and 3 (Petition, p. 2) and discussed in Points I, II and III of the brief (Brief, p. 37ff), were properly raised in the trial court in accordance with the existing Illinois practice and with the decisions of this

court. They were properly assigned as error on the first appeal to the Supreme Court of Illinois (R. 270-275). They were again properly assigned as error on the petition to the Supreme Court of Illinois for writ of certiorari (Appendix, p. 49ff). In transferring this case to the Appellate Court of Illinois, the Supreme Court of Illinois evaded the constitutional questions by departing from its previous decisions as to the proper method of raising such questions in the trial court, as will be hereafter shown.

Whether the Federal constitutional questions were properly raised in the trial court is itself a Federal question, and this court is not concluded by the view taken by the state court. (*First National Bank* v. *Anderson*, 269 U. S. 341, 346; 70 L. Ed. 295, 302; 46 S. Ct. 135, 137). Such constitutional questions were not waived by acquiescing in the transfer of the case to the Appellate Court of Illinois, instead of attempting to appeal to this court (*Prudential Insurance Company* v. *Cheek*, 259 U. S. 530, 66 L. Ed. 1044, 42 S. Ct. 516).

It is sufficient that the validity of the Illinois Commerce Commission orders was "drawn in question" in the trial court; it need not be "specially set up or claimed." See Judicial Code, Sec. 237 (28 U. S. C. A. Sec. 344). The Illinois Appellate Court has held the order of the Illinois Commerce Commission, here involved, to be "legislative in character" (R. 319), and such orders are state statutes within the meaning of section 237 of the Judicial Code (*Live Oak Water Users' Association* v. *Railroad Commission*, 269 U. S. 354, 70 L. Ed. 305, 46 S. Ct. 149). This court has recognized and enforced the distinction between questions of the validity of state statutes, which need only be "drawn in question," and constitutional rights not concerning the validity of statutes, which must be "specially set up or claimed." (*Columbia Water Power Company* v. *Columbia Electric Street R. L. & P. Company*, 172 U. S. 475, 488; 43 L. Ed. 521, 525; 19 S. Ct. 247, 251-252.)

The Federal constitutional question under the commerce clause (Petition, Question 1, p. 2; Brief, Point I, p. 37) was inevitably drawn in question here because Illinois Brick Company's declaration in the trial court (R. 2-15) was based on the reparation order of the Illinois Commerce Commission, and petitioner's plea thereto stated that because of the Interstate Commerce Commission's decision in Docket 11703 the Illinois Commission was "without jurisdiction or authority" to award reparation (R. 17). Petitioner also introduced a copy of the report and order in said Docket 11703 in evidence (R. 217-236). The Illinois Supreme Court has held that in a suit on a bond to stay execution, given pursuant to the provisions of a statute, a plea that the court was "without power or jurisdiction" to stay said execution was sufficient to raise the constitutionality of the statute. (*Moses* v. *Royal Indemnity Company*, 276 Ill. 177, 114 N. E. 554). This court has held that reference by a party in his pleading to Federal laws, and an allegation that the state legislature "had not power" to prescribe the party's duties, sufficiently raised the validity of the state statute (*Waite* v. *Dowley*, 94 U. S. (4 Otto) 527, 24 L. Ed. 181). Petitioner assigned error on appeal to the Supreme Court of Illinois on the grounds that the judgment of the lower court imposed an unlawful burden on interstate commerce in violation of Section 8, Article I of the Constitution of the United States (R. 270), and that the Interstate Commerce Commission having established a lawful rate for the transportation service, the action of the Illinois Commerce Commission awarding reparation was unlawful and void (R. 271). In holding by the order of transfer (R. 303) that this constitutional question was not properly raised, the Illinois Supreme Court sought to evade the constitutional question.

The Federal constitutional question as to whether the Illinois Commerce Commission might, consistently with

due process of law, in effect overrule its prior decision by awarding reparation on a rate previously approved (Petition, Question 2, p. 3; Brief, Point II, p. 41), was properly raised in the trial court by introducing a copy of the prior decision (Illinois Commerce Commission Case No. 10620, R. 210-217). The prior decision found the rates there established just and reasonable (R. 214), while the reparation order found one of the rates unjust and unreasonable (R. 71). The validity of the second order in relation to the first was thus necessarily "drawn in question." The situation presented is analogous to that in which this court has held that a claim that a state statute constituted a contract, and that a subsequent statute was in violation of the contract, raised a question under the provision of the Federal constitution forbidding impairment of the obligation of contracts, although the Federal constitution was not mentioned (*Bridge Proprietors* v. *The Hoboken L. and I. Co.*, 68 U. S. (1 Wall) 116, 17 L. Ed. 571; *Furman* v. *Nichol*, 75 U. S. (8 Wall.) 44, 19 L. Ed. 370). The sufficiency of the evidence thus presented was tested by petitioner's motion to find the issues for defendants at the close of all the evidence (R. 266), and by motion in arrest of judgment (R. 268). This court has held that a motion in arrest of judgment may raise a Federal constitutional question, even though the state supreme court does not pass on it. (*Consolidated Coal Company* v. *Illinois*, 185 U. S. 203, 46 L. Ed. 872, 22 S. Ct. 616). Petitioner assigned error on the grounds that the finding, judgment, and orders of the trial court deprived petitioner of property without due process of law, in violation of the Fourteenth Amendment (R. 270), and that the Illinois Commerce Commission did not have jurisdiction or power to award reparation when to do so it was required to change or reduce a rate previously approved by it (R. 272).

The Federal constitutional question as to whether the

Illinois Commerce Commission had retroactively reduced the rate below the cost of transportation, and thus imposed a confiscatory rate and denied petitioner due process of law (Petition, Question 3, p. 3; Brief, Point III, p. 43), was necessarily drawn in question when Illinois Brick Company introduced in evidence the entire record before the Illinois Commerce Commission (R. 20), and petitioner also introduced the entire record in its defense (R. 237). This put in issue the sufficiency of the evidence before the Commission, which was then presented to the court for ruling by petitioner's motion for a finding in its favor at the close of all the evidence (R. 266). Prior to the instant case, the Illinois courts have never held it necessary to preserve the argument in the record to show that constitutional questions were argued to the trial court. The Illinois Supreme Court has many times held that a general demurrer to a declaration raised constitutional questions, when the declaration was based on a statute open to some constitutional objection. *Shepherd* v. *City of Sullivan,* 166 Ill. 78, 46 N. E. 720; *Woodruff* v. *Kellyville Coal Co.,* 182 Ill. 480, 55 N. E. 550; *Chicago, R. I. & P. Ry. Co.* v. *People,* 217 Ill. 164, 75 N. E. 368; *People* v. *Eisen,* 357 Ill. 105, 191 N. E. 219. Objection to evidence offered under an unconstitutional statute was sufficient. *Pearson* v. *Zehr,* 125 Ill. 573, 18 N. E. 204. When suit is brought on a foreign judgment, the Illinois Court holds that the full faith and credit and due process clauses of the Federal constitution are both necessarily involved, so that a demurrer to a replication raises them, though neither replication nor demurrer mentioned the constitution (*Van Dyke* v. *Illinois Commercial Men's Association,* 358 Ill. 458, 193 N. E. 490), even though this court has held that the full faith and credit clause must be pleaded, or the trial court's attention otherwise directed to it (*Louisville and Nashville Railroad Company* v. *Melton,* 218 U. S. 36, 51-52; 54 L. Ed. 921, 927; 30

S. Ct. 676, 679). Petitioner assigned error on appeal on the grounds that the findings, judgment and orders of the trial court deprived it of property without due process of law in violation of the Fourteenth Amendment (R. 270), and that the evidence before the Illinois Commerce Commission did not warrant the findings of ultimate fact of said Commission, and the action of the trial court in effect finding that it did was error (R. 272).

The Federal constitutional question as to whether the Illinois court has so changed the rule governing appeal from reparation orders of the Illinois Commerce Commission that petitioner has been denied a hearing in court on the merits (Petition, Question 4, p. 4; Brief, Point IV, p. 45) was sufficiently raised by assignments of error on petition for certiorari to the Supreme Court of Illinois. Petitioner assigned as error that section 68 of the Illinois Public Utilities Act, when construed by the Appellate Court of Illinois to require appeal from the order of the Commission entered November 7, 1923 in order to have the sufficiency of the evidence to sustain said order reviewed by the court, denied petitioner due process of law in violation of the Fourteenth Amendment (Appendix, p. 49), and imposed an unlawful burden on interstate commerce in violation of Section 8 of Article I of the United States Constitution (Appendix, p. 50). These assignments were clearly sufficient to raise the constitutional questions. The questions were raised in apt time, because the record shows that the trial court did not hold that the sufficiency of the evidence before said Commission was not before it, but passed on the evidence (R. 245), and the constitutional questions therefore did not arise until the Appellate Court's decision. In such circumstances, the constitutional questions may be first raised after the Appellate Court's decision. *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451. And al-

though a state court may attempt to prevent review on the merits by holding that a utility has waived its rights by failing to appeal from a commission order finding rates unreasonable and stating that reparation would be awarded, this court has held that in such circumstances it will review the entire case on appeal from the final order of reparation. *New York Central Railroad Company* v. *New York & Pennsylvania Company,* 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447.

THE FACTS.

The facts are stated in the petition, pages 9 to 18, and it is not necessary to repeat them here.

ARGUMENT.

I.

ILLINOIS COMMERCE COMMISSION HAD NO POWER TO AWARD REPARATION ON RATES ESTABLISHED PURSUANT TO ORDER OF INTERSTATE COMMERCE COMMISSION.

This case involves the power of the Illinois Commerce Commission to award reparation on a specific intrastate rate in Illinois collected during a period when all intrastate rates in Illinois were fixed at a certain level pursuant to a general order of the Interstate Commerce Commission.

The Interstate Commerce Commission in *Re Intrastate Rates within the State of Illinois,* Docket 11703, had ordered petitioner "to establish, put in force, and maintain rates and charges for freight services and for the transportation of milk and cream in intrastate commerce within the State of Illinois which shall exceed the rates and charges of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, now in effect, under *Ex Parte 74,*". The Commission further ordered that the order in Docket 11703 should "remain in force until the further order of this Commission in the premises." (R. 236.)

This court, in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232, has distinguished between orders of the Interstate Commerce Commission fixing intrastate rates, as follows:

(a) Orders based on preference as between persons or localities in intrastate commerce and interstate commerce (Interstate Commerce Act, Sec. 13 (4), first clause; 49 U. S. C. A., Sec. 13 (4).). Since the authority arises only from

preferences as to specific persons or localities, the order based thereon is effective only insofar as such specific preferences are found by the Interstate Commerce Commission to exist. *American Express Company* v. *South Dakota ex rel. Caldwell,* 244 U. S. 617, 61 L. Ed. 1352, 37 S. Ct. 656, *Illinois Central Railroad Company* v. *Public Utilities Commission of Illinois,* 245 U. S. 493, 62 L. Ed. 425, 38 S. Ct. 170.

(b) Orders based on discrimination against interstate commerce as a whole (Interstate Commerce Act, Sec. 13 (4), second clause, and Sec. 15a (2); 49 U. S. C. A., Sec. 13 (4) and 15a (2)). This power is for the benefit of the carriers, and enables the Commission to raise intrastate rates under Sec. 13 (4) to enable the carriers to earn a fair return under Sec. 15a (2) (as said section read prior to the amendment of June 16, 1933), even though the Commission does not make specific findings of discrimination on all rates. It is sufficient for the Commission to find generally that intrastate rates increased under this power will be reasonable, since to require it to find on each individual rate would prevent effective action. *United States* v. *Louisiana,* 290 U. S. 70, 75-76; 78 L. Ed. 181, 185-186; 54 S. Ct. 28, 31.

The orders of the Interstate Commerce Commission here involved, namely, *Ex Parte 74,* 58 Int. Com. Rep. 220, and *Re Intrastate Rates within the State of Illinois,* Docket 11703, 60 Int. Com. Rep. 92, were entered under the second power above mentioned, to permit the carriers to earn a fair return, and to prevent discrimination against interstate commerce as a whole.

The authority of a state commission after the entry of such an order is the question here. The state commission may seek to evade the order in one or more of the following ways:

(1) It may seek to maintain the pre-existing level of in-

trastate rates as a whole. Such action is clearly indefensible. The state commission will be enjoined therefrom on suit of the interested railroads (*Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 66 L. Ed. 371, 42 S. Ct. 232); and the state commission will be denied an injunction against enforcement of the rates prescribed by the Interstate Commerce Commission (*New York* v. *United States,* 257 U. S. 591, 66 L. Ed. 385, 42 S. Ct. 239).

(2) It may seek to order prospective reductions of individual intrastate rates. Such reductions recognize the paramount authority of the Interstate Commerce Commission, and may be permissible because they do not penalize the carrier for obedience to its order, and because they permit supervision by the Interstate Commission if necessary. However, whether or not a state commission has such power is not in issue here, because the order of the state commission here complained of is not a legislative order fixing rates, but is a semi-judicial order awarding reparation.

(3) It may seek to award reparation on individual intrastate rates. This is the instant case. This court has never, so far as we can determine, expressed itself on this point directly. By inference, however, such assumed power in the state commission has been denied. The injunction granted in *Railroad Commission* v. *Chicago, Burlington & Quincy Railroad Company, supra,* would be wholly ineffective if the state commission could later nullify it piecemeal by awarding reparation.

It may be the law that a state commission has the power to establish a *prospective* intrastate rate in one or a few instances different than that established by the Interstate Commerce Commission, because such action would be subject to the control of the Interstate Commerce Commission, since it could enter another order directly affecting

the specific rates fixed by the state commission; but to permit a state commission to award *reparation* based on a lower rate than that established by a mandatory order of the Interstate Commerce Commission cannot be permitted, because the Interstate Commerce Commission can exercise no power over the order of the state commission awarding reparation, that being a quasi-judicial order. In the analogous situation where the Interstate Commerce Commission assumes jurisdiction over intrastate rates formerly controlled by the state commission, "the substituted schedule is prospective only, and power has not been granted in such circumstances to give reparation for the past." *Atlantic Coast Line Railroad Company* v. *Florida*, ... U. S. .....; 79 L. Ed. (Adv.) 719, 723; 55 S. Ct. 713, 717.

The case of *Eagle Cotton Oil Company* v. *Southern Railway Company*, 46 F. (2d) 1006, reversed 51 F. (2d) 443, certiorari denied, 284 U. S. 675, 76 L. Ed. 571, 52 S. Ct. 130, is not in point here. The Circuit Court of Appeals there held only that where certain *interstate* rates were *permitted* to be charged by general orders of the Interstate Commerce Commission, the same Commission was not prevented from awarding reparation. The present case differs from the one cited in two important respects: (a) Here we deal with an intrastate rate, and the question is of the power of the *state* commission to disregard the order of the *interstate* commission, not the power of the Interstate commission to amend its own order. (b) Here the rate was mandatory, whereas in the Eagle Cotton Oil Company case it was only permissive. This distinction is vital in determining what the carrier is entitled to expect.

We submit that the question presented involves one of the most important relations of the Federal system of control to the state system, and should therefore be decided by this court.

II.

ILLINOIS COMMERCE COMMISSION HAD NO POWER TO AWARD REPARATION ON RATES PREVIOUSLY AUTHORIZED BY IT.

The question of whether the Illinois Commerce Commission had power to award reparation on that part of the rates here in question which were established by a mandatory order of the Interstate Commerce Commission was considered under the preceding point.

In this point we deal with the question whether the Illinois Commerce Commission had power to award reparation on that part of the rates here in question which were previously authorized by it.

This court has held that the Interstate Commerce Commission has no such power (*Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railway Company*, 284 U. S. 370, 76 L. Ed. 348, 52 S. Ct. 183), although this decision was rested solely on statutory, not constitutional, grounds (*Great Northern Railway Company* v. *Sunburst Oil & Refining Company*, 287 U. S. 358, 362; 77 L. Ed. 360, 365; 53 S. Ct. 145, 148.) The overwhelming majority of state courts have likewise held that their state commissions have no such authority. The question had not been passed on in Illinois until the decision in the instant case, many years after the charges were made.

The question here presented was not foreclosed by this court in *Great Northern Railway Company* v. *Sunburst Oil & Refining Company*, 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145. The decision there, permitting award of reparation on an approved rate, was based squarely on the fact that the state court, prior to the time the charges were collected, had stated that reparation could be awarded on an approved rate. This court pointed out that the state court's decision had written into the statute a notice

that authorized payments were subject to refund, and this construction entered into the contract of carriage at its inception. There was no such decision and no such notice in Illinois.

Nor does *Eagle Cotton Oil Company* v. *Southern Railway Company*, 51 F. (2d) 443, certiorari denied, 284 U. S. 675, 76 L. Ed. 571, 52 S. Ct. 130, determine the answer to the present question. Denial of certiorari, of course, did not approve the lower court's opinion, but only the result. The *Eagle Cotton Oil Company* case necessarily decided only that the general increase of rates authorized by the Interstate Commerce Commission in *Ex Parte 74* was subject to reparation *to the extent of the increase there authorized.* It did not decide that the pre-existing rate, established by the Director General, and continued in force by Sec. 208 (a) of the Transportation Act, 1920, was subject to retroactive reduction. The Interstate Commerce Commission in *Ex Parte 74* reserved jurisdiction to reduce the rate only to the extent of the increase there authorized (R. 300). In the instant case, on the other hand, the state court has decided that the rates here in question were subject to reduction, not only to the extent of the increase authorized by the Illinois Commerce Commission in its general rate order, Docket 10620, but also below the rate established by the Director General, and continued in effect by said Section 208 (a). Yet the Illinois Commerce Commission in Docket 10620 also reserved jurisdiction to reduce only the increases authorized in that order (R. 215). In short, in the *Eagle Cotton Oil Company* case, the Interstate Commerce Commission and the court awarded reparation within the limits of the reservation of jurisdiction in *Ex Parte 74;* in the instant case, the Illinois Commerce Commission and the state court exceeded the reservation of jurisdiction in Docket 10620, and retroactively reduced the pre-existing rate.

Furthermore, it appears from the opinion of the Circuit Court of Appeals in the *Eagle Cotton Oil Company* case that the court construed *Brimstone R. & Canal Co.* v. *United States,* 276 U. S. 104, 72 L. Ed. 487, 48 S. Ct. 282, as holding that Ex Parte 74 did not authorize any particular rate, and was therefore subject to reparation. Such holding was, of course, a part of the carrier's contract, as in the *Sunburst Oil & Refining Company* case, and made that contract subject to subsequent alteration.

We submit that the security of the railroad rate structure requires that the carrier know as exactly as possible when rates lawfully collected may subsequently be held unlawful by the same commission, and that this court should grant certiorari herein in order to determine whether or not the Fourteenth Amendment to the Constitution of the United States, or the commerce clause of the United States Constitution, have been violated.

III.

THE RATE FIXED BY THE ORDER HERE INVOLVED IS CONFISCATORY.

The Appellate Court of Illinois, First District, has approved the order of reparation entered by the Illinois Commerce Commission and sued on in this case, although the undisputed evidence before said Commission and before the court showed that the net rate thus retroactively established was much lower than the cost of moving the freight. An alternative ground of decision, that petitioner had waived the right to object to inadequacy of evidence, will be discussed hereafter in Point IV.

This question involves consideration of the facts before the Illinois Commerce Commission and the lower court, but this court will review the decision of a state court on a question of fact when a federal right has been denied as the result of a finding wholly unsupported by evidence.

Northern Pacific Railway Company v. *North Dakota ex rel. McCue,* 236 U. S. 585, 59 L. Ed. 735, 35 S. Ct. 429.

The Appellate Court said that it had examined the evidence before the Illinois Commerce Commission and thought it sufficient to sustain the findings (R. 319). It thus necessarily held that the order of the Commission did not establish a confiscatory rate.

The Commission found that Pennsylvania Railroad Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company had introduced a cost study, and that it was clear "from the cost study" that a rate of 50 cents per ton for single line application provides adequate revenue for the movement in question (R. 47). It made no findings questioning any of the elements of cost in the cost study. The undisputed testimony of the railroads' expert witness was that, if all costs were included, the cost of moving the freight in question would exceed 96.6 cents per ton. Details of this evidence are stated in the Petition, p. 17.

This Court, in *Northern Pacific Railway Company* v. *Department of Public Works of Washington,* 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412, held that an order fixing railroad rates entered by an administrative tribunal, and based on a finding made without evidence, or upon evidence which clearly does not support it, is an arbitrary act against which courts afford relief, and is a denial of due process. This Court has further held that a rate so established is confiscatory, whether or not the railroad earns a reasonable profit on its intrastate business as a whole. *Vandalia Railroad Company* v. *Schnull,* 255 U. S. 113, 65 L. Ed. 539, 41 S. Ct. 324.

The decision of the Court below is in conflict with these applicable decisions of this Court, and should be reviewed.

IV.

THE STATE COURT HAS DENIED PETITIONER AN OPPORTUNITY TO BE HEARD ON THE MERITS OF THIS CASE AND HAS THEREFORE DENIED PETITIONER DUE PROCESS OF LAW.

The question here presented is whether a state court may overrule its previous decision as to the proper method of obtaining a review in the courts of an order of the state commerce commission, under such circumstances that a utility is denied all opportunity of such review.

Section 68 of the Illinois statute, "An Act Concerning Public Utilities", in force July 1, 1921, (Cahill's Illinois Statutes, Chapter 111a, Section 87; Smith-Hurd's Illinois Statutes, Chapter 111-2/3, Section 72) (Petition, p. 6) provided, at the time of the proceedings before the Illinois Commerce Commission which are here involved, that within thirty days after the service of an order of the Commission refusing a rehearing, or within thirty days after the service of any *final order* of the Commission after a rehearing, any person affected may appeal to the state circuit court. Said section further provided that when no appeal is taken, parties affected shall be deemed to have waived the right to have the merits of said controversy reviewed by a court.

The Supreme Court of Illinois in *The Terminal Railroad Association of St. Louis* v. *The Public Utilities Commission*, 304 Ill. 312, 136 N. E. 797, decided October 21, 1922, prior to the proceedings before the Illinois Commerce Commission here involved, had construed Section 68 of "An Act to Provide for the Regulation of Public Utilities", in force January 1, 1914, with reference to appeals from reparation proceedings before the Illinois Public Utilities Commission. Said Commission was the predecessor of the Illinois Commerce Commission, and exercised practically identical powers of regulation, including the power to award reparation. Section 68 of the earlier act provided for appeal from an order of said Public Utili-

tion Commission made after a *final hearing*. It was thus in substance the same as Section 68 of the present Act.

The Illinois Supreme Court held in the case cited that appeal from the Public Utilities Commission to the courts, under Section 68 of "An Act to Provide for the Regulation of Public Utilities", lay only from *final orders* of said Commission. The court by construction thus gave the prior Act identical meaning with the present one in this respect. The court further held that an award of reparation by the Commission was not a final and appealable order, because (the court said) in a suit on the award the carrier is free to open the entire record and procure a judgment of the court in its favor. It necessarily followed from the decision that the only way in which a utility ordered to pay reparation could secure a judicial review of such order was to await suit on the award and then present its defense. No other review was provided by the Act.

Relying on this decision, petitioner permitted the order of the Illinois Commerce Commission, finding reparation due to respondent and reserving jurisdiction to determine the amount, to be entered against it November 7, 1923, and the further order awarding reparation to be entered against it April 16, 1924, without seeking an appeal. (See Petition, p. 14ff, *supra,* for further details of said orders). That this was proper is evidenced by the fact that up to the present time no further attempt to obtain direct review of reparation orders appears in the reports of the Illinois Courts of review. The decision in *The Terminal Railroad Association* case will still be considered authority by all utilities, because the Appellate Court's opinion in the present case has not been designated by it for publication.

After the time within which appeal could be taken had expired, respondent brought the present suit on the award, and contended for the first time on appeal that petitioner should have appealed from the preliminary order of November 7, 1923. The Appellate Court of Illinois sustained

this contention, and held that by failing to appeal petitioner had waived its right to have the merits of the present controversy reviewed by the courts (R. 319).

The Appellate Court also said that it thought the evidence sufficient to sustain the award (R. 319), but the opinion shows this to be a secondary ground of decision. This secondary ground, furthermore, cannot sustain the award, for the undisputed evidence shows the rate established to be confiscatory, as shown in Point III, above. Both alternative grounds of decision, therefore, raise constitutional questions and are before this court for review.

This court in *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, held that when a state court originally holds that the state tax commission has no jurisdiction to correct inequality of taxes, and a taxpayer in reliance on that decision fails to apply to said commission for relief, a subsequent decision by the court that the commission does have such jurisdiction, and the taxpayer has no right in equity because of his failure to apply to the commission, denies said taxpayer due process of law. This case is in principle identical with the Brinkerhoff-Faris case.

In *New York Central Railroad Company* v. *New York & Pennsylvania Company,* 271 U. S. 124, 70 L. Ed. 865, 46 S. Ct. 447, the state commission had found certain railroad rates unreasonable, and stated that upon presentation of a petition and data, it would award reparation. Reparation was afterwards awarded and the railroads appealed. The state court held that the railroads had waived their rights by failing to appeal from the earlier decision of the commission. This court said that failure to appeal from the former order was no bar, and that it would not be reasonable to hold the railroads precluded from getting the protection this court owed them by having failed to go as far as they now learn they might have gone in a previous state proceeding which did not infringe their rights and which could not be brought to this court. So in the

instant case, the attempt of the state court to prevent review on the merits is not reasonable, and cannot prevent this court from reviewing the case on constitutional grounds.

The decision of the state court is not in accord with these applicable decisions of this court. To prevent denial of hearing amounting to denial of due process, this court should review the instant case.

CONCLUSION.

Petitioner respectfully submits that the award of reparation entered by the Illinois Commerce Commission, and approved by the Illinois courts in this case, disregards the paramount authority of the Interstate Commerce Commission and jeopardizes the effectiveness of the protection afforded to the railroads by mandatory orders of the Interstate Commerce Commission fixing intrastate rates; that said award raises the question of the power of a state commission, consistently with due process of law, to disregard its previous orders, upon which railroads have lawfully relied; that the reparation award has imposed upon petitioner, a carrier in interstate commerce, a confiscatory rate; and that the Appellate and Supreme Courts of Illinois, by overruling in effect the prior Illinois decision, have attempted to prevent petitioner from obtaining a hearing in the courts on the merits of said reparation award. All of the foregoing matters raise questions of constitutional and federal law more far reaching than the limits of the instant case.

Respectfully submitted,

FREDERIC D. MCKENNEY
FRANK J. LOESCH
EDWARD M. BURKE,
Counsel for Petitioner.

APPENDIX.

The following are the relevant parts of Pennsylvania Railroad Company's Assignments of Error on Petition for Certiorari to the Supreme Court of Illinois, which do not appear in the record because the record remained in the Appellate Court of Illinois, First District:

18. The Appellate Court refused to review the evidence before the Illinois Commerce Commission, because the Appellate Court held in effect that Section 68 of An Act Concerning Public Utilities, as amended, required that Pennsylvania Railroad Company appeal from the order of the Illinois Commerce Commission, entered November 7, 1923, in order to have the sufficiency of the evidence to sustain said order reviewed by the court. As so construed, said Section 68 denies Pennsylvania Railroad Company due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States and Section 2 of Article II of the Constitution of the State of Illinois.

19. The Appellate Court refused to review the findings in the order of the Illinois Commerce Commission, entered November 7, 1923, because the Appellate Court held in effect that Section 68 of An Act Concerning Public Utilities, as amended, required that Pennsylvania Railroad Company appeal from the said order in order to have the sufficiency of the findings in said order to sustain the order reviewed by the court. As so construed, said Section 68 denies Pennsylvania Railroad Company due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States and Section 2 of Article II of the Constitution of the State of Illinois.

20. The Appellate Court refused to review the evidence before the Illinois Commerce Commission, because the Appellate Court held in effect that Section 68 of An Act concerning Public Utilities, as amended, required that Pennsylvania Railroad Company appeal from the order of the Illinois Commerce Commission, entered November 7, 1923, in order to have the sufficiency of the evidence to sustain said order reviewed by the court. As so construed, said Section 68 imposes an unlawful burden on interstate

commerce in violation of Section 8 of Article I of the Constitution of the United States.

21. The Appellate Court refused to review the findings in the order of the Illinois Commerce Commission, entered November 7, 1923, because the Appellate Court held in effect that Section 68 of An Act concerning Public Utilities, as amended, required that Pennsylvania Railroad Company appeal from the said order in order to have the sufficiency of the findings in said order to sustain the order reviewed by the court. As to construed, said Section 68 imposes an unlawful burden on interstate commerce in violation of Section 8 of Article I of the Constitution of the United States.

22. The order of the Appellate Court affirming the findings, judgment and orders of the trial court impose an unlawful burden on interstate commerce in violation of Section 8 of Article I of the Constitution of the United States.

23. The order of the Appellate Court, affirming the findings, judgment and orders of the trial court, deprived Pennsylvania Railroad Company of property without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States and Section 2 of Article II of the Constitution of the State of Illinois.

24. The order of the Appellate Court, affirming the findings, judgment and orders of the trial court, denied Pennsylvania Railroad Company the equal protection of the laws, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

25. The order of the Appellate Court, affirming the findings, judgment and orders of the trial court, deprived Pennsylvania Railroad Company of its rights under Section 8 of Article I of the Constitution of the United States, and Section 1 of the 14th Amendment to the Constitution of the United States.

27. The Interstate Commerce Commission having assumed jurisdiction of and established the rate for the transportation of common brick in carloads from Bernice, Illinois, to points within the Chicago switching district in the State of Illinois, the said action of the Interstate Commerce Commission established a lawful rate for the transportation service and the action of the Illinois Commerce

Commission awarding reparation based on a different rate was unlawful and void, and the order of the Appellate Court affirming the orders, findings and judgment of the trial court which in effect approved the said action of the Illinois Commerce Commission was error.

29. The Illinois Commerce Commission did not have jurisdiction or power to award reparation when to do so it was required to change or reduce a rate previously approved by it, and the Appellate Court erred in entering its order affirming the orders, findings and judgment of the trial court, which in effect approved such action of the Illinois Commerce Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 360

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION.

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THE BLAKISTON-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION.

JURISDICTION.

The first Federal question presented by this record is whether the Illinois Commerce Commission had power under Federal statutes to enter an order contrary to a previous mandatory order of the Interstate Commerce Commission (Petition, pp. 2, 23; Petitioner's Brief, pp. 29 and 37). Respondent contends this question was not properly raised in the trial court (Respondent's Brief, pp. 13-15). Assuming, without conceding, that this contention is cor-

rect, still the Illinois Appellate Court passed on the question by holding that respondent was not precluded from recovering reparation by any prior order of the Interstate Commerce Commission (R. 317). When the state appellate court passes on a Federal question, this court will not inquire whether it was properly raised. (*Home Insurance Company* v. *Dick,* 281 U. S. 397, 407; 74 L. Ed. 926, 933; 50 S. Ct. 338.) Therefore, if all respondent's statements were true, this question is still before this court and is alone sufficient to confer jurisdiction. However, this Federal question *was* raised in the trial court by notice of special defense filed with petitioner's pleas, and in the other ways mentioned in our original brief (Petitioner's Brief, pp. 29-30).

The remaining Federal questions are constitutional ones. Respondent (Respondent's Brief, pp. 8-9) undertakes to classify the methods by which constitutional questions may be raised under the Illinois practice. This classification omits the methods pursued by petitioner in this case, which are fully sanctioned by Illinois decisions.

The first constitutional question presented by the record is whether Illinois Commerce Commission had power under the commerce clause of the Federal constitution to award reparation contrary to a previous mandatory order of the Interstate Commerce Commission (Petition, pp. 2, 23; Petitioner's Brief, pp. 32, 37). This question goes directly to the jurisdiction of the Illinois Commerce Commission over the subject-matter. It involves not only individual rights, but matters of public policy. When an administrative body thus exceeds its jurisdiction, the constitutional question presented cannot be waived, under the Illinois practice (*Welton* v. *Hamilton,* 344 Ill. 82, 95-98; 176 N. E. 333, 338). Nevertheless, petitioner raised the question in the trial court by its notice of special defense, which

specifically stated that the Illinois Commission was "without power or jurisdiction" because of the Interstate Commerce Commission's decision, and by other methods stated in petitioner's brief (Petitioner's Brief, p. 32).

The second constitutional question is whether Illinois Commerce Commission had power under the due process and commerce clauses to award reparation on a rate it had previously approved (Petition, pp. 3, 23; Petitioner's Brief, pp. 32-33, 41). One way, among others, by which this question was raised was by introducing the previous order of the Illinois Commission in evidence (Petitioner's Brief, pp. 32-33). Respondent says that the question was not raised in one of the ways he prescribes (Respondent's Brief, p. 16). But offering evidence which would only be admissible if a certain statute is void raises the constitutionality of that statute (*People* v. *Sandberg Company*, 282 Ill. 245, 255; 118 N. E. 469, 473). So here, offering evidence which was only relevant to show that the reparation order was void, because in violation of the previous order, raises the constitutional question.

The third constitutional question is whether Illinois Commerce Commission has imposed a confiscatory rate, and thus denied petitioner due process of law (Petition, pp. 3, 24; Petitioner's Brief, pp. 33-35, 43). Respondent contends this question was not properly raised (Respondent's Brief, pp. 16-17). This question could only arise when the evidence before the Illinois Commerce Commission was before the court. Respondent was not obliged to, and did not, plead the evidence, and therefore petitioner could not raise the question in its pleas. After respondent had put the question before the court by introducing at the trial the entire record of the evidence and proceedings before the Illinois Commerce Commission, and petitioner had also introduced the entire record in its defense, the

sufficiency of that evidence to support the award was in issue (See Petitioner's Brief, p. 34). Petitioner presented the issue to the court for decision by its motion to find in its favor at the close of all the evidence (R. 266). This motion raised the question of the sufficiency of the evidence before the Illinois Commerce Commission and before the court, and was an appropriate means of testing the constitutionality of the Commission's award based on such evidence. It is the general rule in Illinois that a motion to find the issues in favor of a party, made at the close of all the evidence, presents all questions of law arising on the evidence (*Maxcy-Barton Organ Co.* v. *Glen Building Corp.* 355 Ill. 228, 230; 189 N. E. 326, 327. *National Can Co.* v. *Weirton Steel Co.*, 314 Ill. 280, 284; 145 N. E. 389, 390-391. *Pressed Steel Equipment Co.* v. *Thornburgh Pressteel Co.*, 312 Ill. 359, 366; 144 N. E. 6, 9). A motion presenting all questions of law raises questions of constitutional law, although it does not mention the constitution. Thus the Illinois Supreme Court has held, in the very case cited by respondent (Respondent's Brief, p. 8), that objections to instructions to the jury based on a statute challenged the constitutionality of the statute, although the objections did not specify constitutional grounds (*Christy* v. *Elliott*, 216 Ill. 31, 36-39; 74 N. E. 1035, 1038).

The contention of respondent (Respondent's Brief, p. 17) concerning the fourth constitutional question is sufficiently answered in petitioner's original brief (Petitioner's Brief, p. 47).

ARGUMENT.

PETITIONER HAS COMPLIED WITH THE RULES OF THIS COURT.

Respondent contends that the petition should be dismissed for failure to file a complete record, and cites Rule 38 of this Court (Respondent's Brief, p. 19). Respondent has evidently overlooked Paragraph 7 of Rule 38, which provides that "where the record has been printed for the use of the court below and the necessary copies as so printed are furnished, it shall not be necessary to reprint it for this court, but only to print such additions as may be necessary to show the proceedings in that court and the opinions there." It has been the consistent practice of this court to accept abstract records, such as are used in Illinois, as a basis for consideration of petitions for certiorari in this court.

Furthermore, respondent has waived any objection to the sufficiency of the record by failing to file an additional abstract during the proceedings below. The constitutional questions urged here were presented to the Illinois Supreme Court by assignments of error. Rule 38 of that court makes it the duty of the appellant (petitioner here) to furnish a complete abstract of the record. This petitioner did, and that abstract is the record presented here. The rule further provides that the abstract "will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is incomplete or inaccurate in any substantial part." Respondent did not file any further abstract, either on the original appeal to the Illinois Supreme Court or on petition to that court for certiorari, and therefore ac-

quiesced in the Illinois Supreme Court's use of petitioner's abstract as a sufficient basis for consideration of the identical errors now relied on.

Respectfully submitted,

FREDERIC D. MCKENNEY,
FRANK J. LOESCH,
EDWARD M. BURKE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 360

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

On Writ of Certiorari to the Appellate Court of the State of Illinois, First District.

BRIEF FOR PETITIONER.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 360

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

On Writ of Certiorari to the Appellate Court of the State of Illinois, First District.

BRIEF FOR PETITIONER.

Preliminary Statement.

The case is here on writ of Certiorari as authorized by Section 237(b) of the Judicial Code as amended by Act of February 13, 1925, c. 229, 43 Stat. 936; U. S. Code Title 28, Sec. 344, to review a final judgment of the Appellate Court of Illinois, First District, entered on the 24th day of December, 1934 (R. 218), which in turn affirmed a final judgment of the Circuit Court of Cook County, Illinois, entered in the cause under date of December 5, 1933, awarding damages with interest and an attorney's fee in the total

sum of $44,428.09, in favor of Illinois Brick Company, plaintiff in said trial court, respondent here, and against The Pennsylvania Railroad Company, petitioner here and defendant below (R. 14).

The time for filing application for Certiorari in this Court was "extended to and including the 16th day of August, 1935" (R. 237); same was filed August 12th, 1935, and granted October 14, 1935; see Record, front cover.

On the application for certiorari certain questions, based on the record, were suggested as presenting matters of consequence, Federal in character, worthy of consideration and determination by this Court.

Those questions with their attending bases may be shortly paraphrased as follows:

1. In view of Section 8, Article 1, of the Constitution of the United States, "The Congress shall have power * * * to regulate commerce * * * among the several States" * * *, and provisions of the Act to Regulate Commerce as Amended, Sections 13, *et seq.*, made in pursuance thereof; of Section 208(a) of the Transportation Act, 1920, and of certain pertinent rate orders issued by the Director General of Railroads during continuance of Federal Control and of orders of the Interstate Commerce Commission issued both during said Federal Control and subsequent thereto, did Illinois Commerce Commission, a State regulatory tribunal with limited authority in rate matters of purely intrastate import, have power in the circumstances disclosed by the instant proceedings to award such reparations as the judgment of the Appellate Court under review requires petitioner, The Pennsylvania Railroad Company, to pay to respondent, the Illinois Brick Company.

The Pennsylvania Railroad Company is, and at time of the occurrences herein recited was, a carrier by steam railroad engaged in both interstate and intrastate transportation and commerce. The reparations complained of were awarded because of certain allegedly unreasonable and discriminatory rates and charges exacted by said carrier from respondent on identified carload shipments of common brick which moved between October 28, 1920 and February 15, 1922, from respondent's plant at Bernice, Illinois, a point outside of the Chicago Switching District, to destination points within such district.

During Federal control the United States Railroad Administration had established the specific rates on common brick which the carrier exacted and such rates were continued in force and effect by Section 208(a) of the Transportation Act, 1920, by pertinent orders of the Interstate Commerce Commission and in part by orders of the Illinois Commerce Commission itself.

The rate base prescribed by the Illinois Commission upon which its reparation order is founded was and is not only lower than the rates established by mandatory order of the Interstate Commerce Commission, but was and is also lower than the specific rates on brick prescribed by said Railroad Administration and continued in force by said Section 208(a) of the Transportation Act, 1920, as amended.

2. In the circumstance did the award of reparation complained of constitute a denial of due process contrary to the Fourteenth Amendment of the Federal Constitution and constitute an unlawful burden on interstate commerce contrary to Section 8 of Article I of the Constitution and the laws of the United States made in pursuance thereof, in that such award of reparations, if permitted to be enforced by the concurring judgments of the State courts here under

review will result in the retroactive establishment of prejudicial and discriminatory rates and charges against other shippers of other carloads of common brick which moved contemporaneously between the same and similarly related points of origin and destination under like circumstances and conditions and paid the then currently existing, duly published and legal rates for the transportation service rendered; and at the same time and in the same retroactive manner will establish and apply as compensation for such service a rate of charge which is less than the actual cost of the service which was rendered?

Opinion and Judgments.

The opinion of the Appellate Court of the State of Illinois, First District, has not yet been reported, but will be found reproduced in entirety in the printed transcript of the record beginning at top corner paging 222. The judgment of the Appellate Court will be found at page 218, and that of the Circuit Court of Cook County at page 14 of said record, while the proceedings before the Illinois Commerce Commission, viz., the Amended Complaint of Illinois Brick Company, the answer of the carriers and the findings and order of November 7, 1923, of that Commission will be found at record pages 23, 29, 32 and 33, while the final order of that Commission awarding the reparations complained of, dated April 16, 1924, will be found at page 38.

The defendant carriers did not pay and as authorized by State law, Section 72 of Chapter 111A of the Statutes of Illinois, "approved June 29, 1921, in force July 1, 1921," action was brought in Circuit Court of Cook County, Illinois by the Illinois Brick Company the shipper, (R. 1) to enforce same.

SUMMARY STATEMENT

As to Parties, Subject and Proceedings.

The region referred to in the course of these proceedings as the "Chicago Switching District" finds precise definition as to boundaries in Lowery tariff so-called, being Illinois Public Utilities Tariff 39, referred to in the findings of that Commission and opinion of Appellate Court (R. 224) but is not precisely set forth in the record. Its precise boundaries are not in anywise in question and it will suffice to say that it is an irregular area including in considerable part portions of the city of Chicago and its immediate environs. Though in principal part within the State of Illinois, a modicum of the southeastern portion thereof is located in the State of Indiana. (R. 74, bottom paragraph).

The Pennsylvania Railroad Company is a well-known common carrier engaged in intrastate as well as interstate transportation and operates in, through and about the "Chicago district" which includes the Chicago Switching District.

The commodity involved is common brick which moved in carload lots from numerous brick yards or plants located in the vicinity of Chicago, some within and some outside of the Switching District to short haul points of destination within the District. Points of origin located outside of the Switching District vary in distance from District boundaries from a mile and a half at Bernice, outside of the District in Illinois, to 10 miles at Miller's, which is in Indiana. (R. 74).

Illinois Brick Company is a corporation engaged in manufacturing and selling of common brick. Its principal place of business is in the city of Chicago and it complained before the Illinois Commerce Commission of the rate charges exacted by the defendant carrier on carload ship-

ments of common brick from its brick plant located at Bernice, Illinois, which moved to various points within the switching district, alleging prejudice and discrimination by reason of competition with the output of other manufacturers whose plants were located within the District, such output having moved on an applicable intrastate tariff rate much lower than the rate applying on like shipments from points outside of the District to points within.

The Illinois Commerce Commission found the rate complained of to be unjust and awarded reparation as prayed.

Whether its action in so doing was valid in the circumstances hereinafter set forth, constitutes the crux of the matter for decision. Both the Circuit Court of Cook County, Illinois, and the Appellate Court of Illinois have upheld the Commission's award. The Pennsylvania Railroad Company on errors duly assigned (R. 193) and questions above indicated, prays reversal on Federal grounds.

Jurisdiction.

Petitioner is a common carrier by steam railroad subject to the Act to Regulate Commerce as Amended and to the orders of the Interstate Commerce Commission made pursuant thereto and in conformity therewith.

In the course of the proceedings both in the Circuit Court of Cook County, Illinois and in the Appellate Court of Illinois, First District, that being the highest court of said state in which judgment could be had, it asserted that the certain orders of the Illinois Commerce Commission passed on November 7, 1923, (R. 32) and April 16th, 1924 (R. 38), which awarded reparation for alleged excessive freight charges collected by Petitioner from Illinois Brick Company for the intrastate transportation of carload shipments of common brick from Bernice, Illinois to destination points within the Chicago switching district, during the

period October 28, 1920 and February 15, 1922, were illegal and should not be enforced,—

(a) because before instituting its complaint with the Illinois Commerce Commission Illinois Brick Company had filed complaint praying reparation with the Interstate Commerce Commission involving substantially the same rates and reparation there had been denied to it. (R. 74).

(b) because prior to April 18, 1922, and throughout the period for which reparation had been awarded by the Illinois Commerce Commission the rates complained of by Illinois Brick Company had been published and collected by this and other carriers similarly situated in obedience to orders passed by the Interstate Commerce Commission and adopted or followed in orders issued by Illinois Commerce Commission in order to remove undue prejudice, preference and advantage, and unjust discrimination found by said Interstate Commerce Commission then to exist in the relationship of the corresponding interstate and intrastate rates and charges;

(c) because on or about March 16, 1922, said Illinois Commerce Commission following the indications of the Interstate Commerce Commission, by its own order duly entered, had approved and continued in effect the rates and charges of which respondent complains as "the lawful, established and applicable intrastate rates and charges for the State of Illinois";

(d) because the Illinois Commerce Commission was and is without jurisdiction to penalize this Petitioner by an award of damages or reparations for acts done pursuant to authority conferred by the Interstate Commerce Commission or in obedience to its specific orders, and

(e) because the courts of Illinois for like reasons and on similarly stated grounds were without jurisdiction or authority to enforce the reparation order of the Illinois Commerce Commission.

This petitioner also asserted the reasonableness of rates and charges collected on their own merits and the inapplicability in the circumstances of specified sections of the Illinois statutes upon which the Illinois Brick Company in its complaint before the Illinois Commission had counted. (R 12, 13).

All such defenses and others similarly grounded suggested in course of the proceedings were rejected by both State tribunals in turn, the issues in matters of law were found in favor of the plaintiff, Illinois Brick Company, and damages including interest and an attorney's fee of $2,000, were assessed against this Petitioner in the total sum of $44,428.09 (R. 192).

As to finality of the decree of the Appellate Court of the State of Illinois and the jurisdictional power of this Court to review same notwithstanding the action of the Supreme Court of Illinois in the premises, see:—

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102, 104;
Prudential Insurance Co. v. Cheek, 259 U. S. 530, 533;

compare also—

Home Insurance Co. v. Dick, 281 U. S. 397, 407;
Minneapolis, St. Paul &c. Ry. Co. v. Rock, 279 U. S. 410.

The Facts.

The facts upon which the Illinois Commerce Commission based its award of reparation, and the two State courts based their concurring judgments upholding the award are not now in serious dispute. They, together with the course of the controversy as it progressed before the Federal and State regulatory commissions and through the State courts are fairly set forth in the opinion of the Appellate Court

(R. 222-227), which in its pertinent stating part is here reproduced as affording basis for Petitioner's contention that the judgment of the Appellate Court, which affirmed the judgment of the Circuit Court of Cook County, should be reversed and the case remanded with instructions to dismiss the bill of complaint:—

MR. JUSTICE MATCHETT:

(R. 222) "The basis of the suit brought by plaintiff is an order entered by the Illinois Commerce Commission on April 16, 1924, which incorporated therein a previous order of that Commission entered on November 7, 1923. This order awarded reparation to plaintiff on account of freights paid by it upon shipments of brick made from Bernice, Illinois, to certain points within the Chicago switching district between October 28, 1920, and February 15, 1922. As to shipments made prior to that time, namely, between March 1, 1920, and October 28, 1920, the Commission found that the complaints of the Brick Company had not been filed within the time required by statute, and that reparation for these shipments was barred.

"Statements were filed with the Illinois Commerce Commission on December 31, 1923, showing excess charges collected by the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company (then co-defendant, afterwards dismissed out of the case) in the sum of $7,093.82, and similar excess charges collected by the Pennsylvania Railroad in the sum of $21,869.90. The order of April 16, 1924, incorporating the order of November 7, 1923, recited the reservation of jurisdiction for the purpose of awarding reparation for charges collected in excess of rates found to be just and reasonable and ordered that defendants be authorized and directed to pay the amount of reparation so found to be due plaintiff on or before May 1, 1924, with interest at the legal rate. The railroads did not pay.

"Thereafter, on December 31, 1924, March 3, 1925, and April 13, 1925, plaintiff filed three suits, one in assumpsit, one in tort and one in debt. In each case the order of the Illinois Commerce Commission of April 16, 1924, was set up

verbatim. It was averred that the rates collected by defendant were unreasonable, discriminatory and unduly preferential and prejudicial, and in violations of section 32 and 38 of the Public Utility Act (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 111 2/3, secs. 32 and 38), and that plaintiff was entitled to recover the amount of the order with attorney's fees, pursuant to section 72 of chapter 111 2/3 of the statutes (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 111 2/3, sec. 72, par. 76).

"Upon the trial plaintiff offered in evidence a certified copy of the complete record before the Illinois Commerce Commission; * * * Defendant offered in evidence a certified copy of an order of the Illinois Commerce Commission dated August 10, 1920, Docket 10620, to which was attached a copy of the report of the Interstate Commerce Commission, dated July 29, 1930, In Ex Parte 74, also a certified copy of the order of the Interstate Commerce Commission entered January 11, 1921, Docket 11703, Re: Intrastate Rates in Illinois. Evidence was also offered by plaintiff with reference to attorney's fees.

"At the conclusion of the trial plaintiff dismissed as to the Pittsburgh, etc. Company, and the court deducted from the sum of $28,965.72, mentioned in the order of the Commission, the sum of $292.70, being the amount of supposed excess charges of the Pittsburgh Company made between October 28, 1920, and January 1, 1921, the date upon which the lease to the Pennsylvania Railroad Company became effective. There was a finding for the amount of reparation due from both defendants against the Pennsylvania Company with interest at 5 per cent from May 1, 1924, making a total finding of $42,428.09, plus $2,000 costs allowed as attorneys' fees. There was a motion by the Pennsylvania Company in arrest of judgment, which was overruled, and the judgment was entered.

Plaintiff (Illinois Brick Company) is a manufacturer and shipper of common brick; its place of business is at Bernice, Illinois, which is about two miles southeast of an irregular area known as the Chicago switching district. While Bernice is not actually within this district, it is so close to it that plaintiff's product is in direct competition

with plants located within the district. At the times for which reparation was allowed defendants charged rates of 93½ cents, 94½ cents and 98 cents per ton on common brick shipped from Bernice to points within the switching district. All these shipments were purely intrastate. At the same time the intrastate rate within the district charged plaintiff's competitors for the same product was 40 to 42 cents per ton.

The rates charged came into existence as follows: In August, 1911, the Lowrey tariff, so called, Illinois Public Utilities Commission 39 (carrier made), was adopted by the shippers and carriers in the Chicago district. It fixed a rate of 30 cents per ton on all commodities for shipments between points located within the switching district. Common brick, because it was a cheap, low grade commodity, was given a lower rate of 25 cents per ton for a single-line haul. Bernice and some other points were so close to the switching district and so directly in competition with plants located within it that a 25 cent rate for common brick was fixed for shipments which originated at these points destined to locations within the switching district for a single-line haul. By the Lowrey tariff Bernice was put on a parity with points of origin within the district. This 25 cent rate continued until June 25, 1918, when general order No. 28, issued by the director general of traffic as a war measure, took effect. The purpose of that order was to secure additional revenue for the railroads. It increased railroad freight rates throughout the whole country by 25 per cent with certain exceptions where flat increases were made. One of these exceptions was common brick via single-line hauls, and on this commodity a flat increase of 2 cents per hundred pounds, or 40 cents a ton, was added to the former rates. The two-line rates on brick within the district was under the Lowrey tariff carried as general commodities. Thus the two line rate was advanced only 25 per cent, making it 40 cents per ton, while as a result of this order the new one line rate was made 70 cents per ton, using the Commission rule for the disposition of fractions. The result was so clearly unfair that the director general issued Freight Rate Authority 1887, effective October 18, 1918. This order

substituted within the Chicago switching district a 25 per cent increase on common brick for the flat 40 cents per ton increase which had been fixed by general order No. 28. By inadvertence, apparently no substitution was made as to rates on common brick from Bernice and other like competitive points which were outside the switching district. The result was that within the district the rate for common brick became 30 cents per ton, while from Bernice for the same commodity it was 70 cents per ton.

Plaintiff and shippers similarly situated filed a complaint with the Interstate Commerce Commission. The case is known as Docket 11317 and was decided October 27, 1921. This was, however, after the determination of the jurisdiction of the Interstate Commerce Commission over intrastate rates. Under the provisions of the transportation act of 1920 that jurisdiction ceased September 1, 1920. The report of the Interstate Commerce Commission said: "We are asked to award reparation and to establish reasonable and non-prejudicial rates for the future. Except under circumstances not here present, our jurisdiction over intrastate rates is limited to the period of federal control." In both the report and the order which was entered pursuant to it, the Commission was careful to limit its findings to interstate rates. Apparently, it was wholly without jurisdiction to pass on intrastate rates and expressly disclaimed any intention of doing so. The report of the Commission, however, found that the rate of 70 cents per ton from Bernice to interstate destinations within the Chicago switching district was not unreasonable but unjustly discriminatory to the extent that it exceeded by more than 10 cents per ton contemporaneous rates applicable to interstate shipments between points wholly within the switching district. It ordered the carriers to remove such discriminations not later than February 16, 1922.

While this proceeding was pending before the Interstate Commerce Commission, that Commission held a general rate investigation known as Ex Parte 74, 58 I. C. C. 220. As a result of that investigation the Interstate Commerce Commission authorized the railroads to increase freight rates in general by various percentages which ranged from 25 to

40 per cent. This order was limited solely to interstate rates and did not undertake to apply any specific rates to any specific commodities. In fact, it recited that to prevent injustice necessary adjustments would have to be made.

Thereafter, the Illinois Commerce Commission, in a proceeding known as Docket 10620, authorized an increase in the general level of intrastate rates in order to make the same conform to Ex Parte 74. This order was entered August 10, 1920, and authorized an increase in the general level of intrastate rates in Illinois by 33 1/3 per cent, afterward changed by supplemental order to 35 per cent. Here also the Commission did not give consideration to specific rates. The Interstate Commerce Commission, in Ex Parte 74, having authorized a general increase of 40 per cent in interstate rates in certain parts of Illinois, a complaint was made to that Commission that the increase of 33 1/3 per cent and 35 per cent by the Illinois Commission on intrastate rates were not sufficient. That complaint is known as Docket 11703, and by a decision made January 11, 1921, the Interstate Commission required the substitution of a 40 per cent increase in the general level of intrastate rates in Illinois. This was supplementary to Docket 10620. Here again specific or particular rates were not considered by the Commission. The result of the 33 1/3 per cent increase in the general level of rates was to increase the rate on common brick from Bernice to the switching district from 70 to 93½ cents per ton. As a result of the substitution of a 35 per cent increase for the 33 1/3 per cent increase the same rates were increased to 94½ cents per ton, and as a result of the order entered in Docket 11703 the rate was increased to 98 cents per ton. On the other hand, as a result of the order of the Interstate Commerce Commission in Docket 11317, defendant and other railroads reduced the rates on brick from Bernice and other like points from 98 cents to 50 cents per ton. At this time the rates on brick within the district were from 40 to 42 cents per ton. The railroads at the same time increased these rates to 50 cents, again putting the Bernice rates on a parity within the switching district. The order in Docket 11317 authorized defendant to charge 10 cents per ton more on common brick

from Bernice than they charged on brick within the Chicago switching district. Defendant, however, did not take advantage of this privilege but voluntarily restored the parity which had existed during the period of August, 1911, to June 25, 1918."

In addition to the foregoing summary statement by the Appellate Court, the following, though probably unnecessary, may prove not only of interest but possibly also helpful:

When it became apparent that the Director General's Freight Rate Authority 1887 order had fallen short of what had been its true purpose, Illinois Brick Company, among other shippers of bricks, complained to carriers serving brick yards located outside of the Switching District (e. g., Bernice) of the obvious differences in rates applicable to closely competitive traffic and asked that the 70¢ per ton rate on brick moving from Bernice to points within the Switching District be reduced to conform with the 30¢ per ton rate on like traffic moving between points both situated within the District (R. 42). The carriers thus approached recognizing the justice of the complaint of the brickmakers, filed with the standing Rate Committees petitions for permission to so equalize the rates and their petitions so to do were approved by the Rate Committees, but were, in turn, denied by the Director General of Railroads (R. 42), who had the last say.

The highly divergent rates of 70¢ and 30¢ by virtue of such denial of the Director General of Railroads were in effect on February 29th, 1920, the effective date of Transportation Act, 1920, and were continued in operation by Section 208(a), whereby then existing rates on both intrastate and interstate freight shipments were expressly ordered to be continued in effect "until thereafter changed by State or Federal authority * * *," it being further

provided by said section that none of such rates should be reduced prior to September 1, 1920, without express approval by the Interstate Commerce Commission.

July 29, 1920, the Interstate Commerce Commission, by its order in *Ex Parte* 74, 58 I. C. Rep. 220 (R. 197-212) raised all interstate rates from and to points in Illinois by 40% of the rates then prevailing (R. 208).

Said order of July 29, 1920, by its terms became effective August 26, 1920.

Prior to said effective date, namely, on August 10th, 1920, the Illinois Public Utilities Commission, official predecessor of the now existing Illinois Commerce Commssion, entered an order in a certain case No. 10620, then pending before it, which authorized a general increase of *intrastate* freight rates in Illinois by 33⅓% (7 Ill. Pub. Util. Reps. 1047, R. 146, 148).

Pursuant to and as authorized by this last order Petitioner, The Pennsylvania Railroad Company, established a rate of 93½¢ per ton on brick from Bernice to Illinois points within the Chicago Switching District, and a further rate of 40¢ per ton on brick moving between Illinois points located within the said Switching District (R. 34).

By a supplement to its said order the Illinois Public Utilities Commission in November 1920, authorized intrastate rates in Illinois to be increased 35% instead of 33⅓% prescribed by its said order of August 10th, 1920 See Ill. Pub. Util. Com'n Reps., page 31, Vol. 8.

The effect of said supplemental order was to increase the rate of 93½¢ per ton on brick from Bernice to Illinois points within the Chicago Switching District to 94½¢ per ton and to further increase the rate of 40¢ per ton between Illinois points within said Switching District to 40½¢ per ton (R. 34).

By reason of compliance on part of the carriers with the above specified orders of the Interstate Commerce Commission and the Illinois Public Utilities Commission, there were simultaneously operative between points associated with the Chicago Switching District two divergent rates, one interstate and one intrastate, and there also came into effect and were simultaneously operative between Bernice and points within the said Switching District two rates, one interstate and the other intrastate. The higher rate in each case applicable to interstate commerce, was established by the 40% increase authorized in *Ex Parte 74* (R. 197). The lower rate in each case applicable to intrastate commerce, was established as the result of the 35% increase authorized and granted by the Illinois Public Utilities Commission.

January 11th, 1921, the Interstate Commerce Commission in *Re: Intra-State Rates within the State of Illinois*, Docket No. 11703, 60th I. C. Reps. 93 (R. 152-170) by order required carriers concerned to increase intrastate freight rates in Illinois 40% above the level of such rates in effect prior to July 29, 1920, that is, prior to the date of entry of the order in *Ex Parte 74*, above referred to. The effect of said order of January 11th, 1921, was to equalize the level of intrastate freight rates in Illinois with those of interstate freight rates established in *Ex Parte 74* (R. 208), with result that the rate on brick from Bernice to Illinois points within the Switching District was again increased from 94½¢ per ton to 98¢ per ton, and the corresponding rates between Illinois points, both of which lay within the said Switching District, was again increased from 40½¢ per ton to 42¢ per ton (R. 168-170, 35).

To correct the anomalous rate situation Illinois Brick Company, with other shippers similarly situated, lodged

complaint (Docket 11317 submitted May 13, 1921 and decided October 27, 1921) with the Interstate Commerce Commission, 64 I. C. Rep. 273 (R. 73-83).

In that proceeding Illinois Brick Company and its associated complainants sought reparation because of the alleged unfair disparity between the rate of 70 cents per ton charged and collected on shipments of common brick which moved from Bernice to both interstate and intrastate destinations within the Chicago Switching District, subsequent to June 25, 1918, and the lesser rates collected on movements wholly within the District.

In disposing of the matter the Interstate Commerce Commission said (R. 74):

> "We are asked to award reparation and to establish reasonable and non-prejudicial rates for the future. Except under circumstances not here present, our jurisdiction over intrastate rates is limited to the period of Federal control. * * * Except where otherwise indicated, rates will be (are) stated in amounts per net ton and do not include the general increases of 1920.
>
> * * * * * * *
>
> (R. 77) Although pressing the allegation of intrinsic unreasonableness, the principal grievance which is sought to be corrected is the manifest injustice of the spread of 40 cents in most cases, which exists in favor of the points within and against the points outside to Chicago (Switching) District destinations. Chicago is the principal market for the product of the complainants, and the present advantage in freight rates which is enjoyed by the plants within the District over those outside is obvious. * * *
>
> The records are clear that it was the intention of the Railroad Administration to apply the flat increases, where such was specifically provided, to line-haul rates generally throughout the country, including hauls complete within themselves from shipper to consignee be-

tween two points within the switching limits of a city or district. But the interpretation of general order No. 28 was not always uniform as to complete hauls when entirely within a district. * * *'' (R. 78),—

We have several times recognized the propriety of the action of various carriers reaching Chicago in excepting certain commodities and classes of traffic from the provisions of the Lowrey tariff. *Rates on Hay to Chicago,* 34 I. C. C. 150, and cases therein cited.

We find that the rates under attack (namely, ex-Bernice) were not and are not unreasonable, but they were, are and for the future will be unduly prejudicial to the extent that the rates from the points outside of the Chicago District exceed the rates from points inside of that District to interstate destinations therein by more than 10 cents per net ton. *Complainants and intervener have not shown themselves entitled to damages as a result of such undue prejudice.''* (All emphasis supplied.) (R. 81).

* * * * * * *

An appropriate order in customary form was entered under date of October 27th, 1921. (R. 82-83).

February 16th, 1922, after the entry of said order by the Interstate Commerce Commission, this petitioner reduced its published rates on common brick from Bernice to both interstate and intrastate points within the Chicago Switching District, to 50 cents per net ton, (R. 35, 52) thus precisely complying with the specifications of the Interstate Commerce Commission's requirements.

Not satisfied, however, on October 28th, 1922, Illinois Brick Company filed before the Illinois Commerce Commission its further petition for reparations based on the alleged unreasonable and unjustly discriminatory rates applied to common brick shipments moving between Bernice, Illinois and *intrastate destinations within Chicago Switch-*

ing District between October 28th, 1920 and February 15th, 1922, (R. 15-21).

By answer duly filed in said proceeding this petitioner denied damage and also denied that complainant was entitled to reparation, on the ground that:

(R. 22.) "Prior to 18th day of April, 1922, the rates complained of were published and collected * * * in obedience to the order of the Interstate Commerce Commission in its docket No. 11703, dated January 11th, 1921, * * * (which) said order of January 11th, 1921 was vacated by the Interstate Commerce Commission on the 18th day of April, 1922 by reason of and only because of the Illinois Commerce Commission having on March 16, 1922 approved and continued in effect said rates and charges as *to* the lawfully established and applicable intrastate rates and charges. The Illinois Commerce Commission is without authority or jurisdiction to penalize or award damages or reparation against the respondents for the acts of said respondents pursuant and in obedience to the said order of the Interstate Commerce Commission."

Thereafter, January 26th, 1923, the Illinois Brick Company filed an amended complaint reiterating its demand for "due reparation" by reason of "the difference between the rates charged of 70 cents, 93½ cents, 94½ cents and 98 cents per ton and the rates of 30 cents and 40 cents per ton or such other sum as," in view of the evidence to be adduced complainant may be entitled to. (R. 23-29).

By its answer filed February 8th, 1923, before said Illinois Commerce Commission this petitioner asserting the bar of the statute of limitations and reiterating its dependence upon provisions of Section 208(a) of the Transportation Act, 1920, as construed by the Interstate Commerce Commission in conference ruling voted and adopted March 13, 1922 to effect that the said Commission was without authority—

(R. 31) "to award reparation, or consent to award of reparation made by a State Commission on intrastate shipments which moved during the guaranty period March 1 to September 1, 1920",

asked that said amended complaint be dismissed. (R. 29-32).

November 7th, 1923, after hearing, the Illinois Commerce Commission entered its order of said date (R. 32) which, after reviewing the history of the diverse rates above outlined, concluded as follows:

(R. 36) "It is also clear from the cost study that the rate of 50 cents per ton for single line application at the time shipments here under consideration moved provides adequate revenue for the transportation of the brick from Bernice, Illinois to points of destination within the Chicago Switching District and intermediate points covered by this complaint. * * * Giving due consideration to the development of all of the rates from all brick producing plants within the Chicago Switching District and points immediately beyond the said switching district, the services performed and conditions under which such services were performed, we find that the complainant (Illinois Brick Co.) has been damaged to the extent that the charges assessed are greater than the charges that would have been assessed had the said charges been predicated on a rate of 50 cents per ton, minimum 60,000 pounds per car."

First reserving "jurisdiction of the subject-matter and of the parties for the purpose of determining the amount of reparation due under" its findings, the Illinois Commerce Commission directed your Petitioner to file within 60 days from date of said order "a statement showing car number and initial, date of shipment, date of delivery, point of origin, destinations, rate charge, charges assessed and rate and charges that would have been assessed and amount of reparation under the findings of" said Illinois Commerce Commission as expressed.

No appeal was taken from said order of November 7th, 1923 by your petitioner.

A statement containing all information required by the State Commission was prepared and furnished by the Railroad Company (R. 139-140), and were filed by the plaintiff Brick Company (R. 37; statement was omitted from printing by stipulation, see R. 237-240).

December 31st, 1923, the Illinois Brick Company filed statements before the Illinois Commerce Commission purporting to show on basis of numerous shipments the amount of reparations due. (R. 37, 140).

April 16, 1924, the Illinois Commerce Commission passed its order of said date embodying its earlier order of November 7, 1923, finding that:

> "the complainant (Illinois Brick Co.) is entitled to an award of reparation in the amount of $28,965.72 and interest at the legal rate from the date of payment for excessive freight charges collected on shipments transported by the Pennsylvania Railroad Company * * * from Bernice, Illinois, to points within the Chicago switching district, during the period October 28, 1920 to February 15, 1922." (R. 38).

Defendant railroad companies did not obey the Illinois Commerce Commission's direction (R. 38) to pay the reparation with interest awarded and the Brick Company on dates in December, 1924 and March, 1925, filed its suits three in number, subsequently consolidated as one for purposes of trial (R. 1), each of which counted upon the Commission's order of November 7, 1923, finding reparation to be due and the Commission's subsequent order of April 16, 1924, establishing the amount thereof (R. 1-11).

By pleas filed (R. 11-13), the defendant urged orders and authority of superior Federal power in bar.

Jury was waived, evidence submitted and motion of defendant carriers to find issues for defendants having been

overruled with exceptions duly noted (R. 170) and on motion of plaintiff, not objected to, defendant Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company having been dismissed from the proceedings (R. 189) findings with judgment thereon went for plaintiff (R. 191). Appeal to Supreme Court of Illinois was prayed by The Pennsylvania as sole remaining defendant, and allowed (R. 191).

All Federal questions previously raised in course of the entire proceeding both before the Illinois Commission and the trial court were preserved by appropriate assignments of error (R. 193-196).

Illinois Supreme Court found and adjudged that the case had been "wrongfully appealed to this (that) court" and ordered it to be transferred to the "Appellate Court of the First District of the State of Illinois" (R. 215) which was done and the judgment here under review (R. 218) resulted.

For grounds of judgment as stated in the Appellate Court's opinion see R. pp. 227-234.

ARGUMENT.

I.

The Illinois Commerce Commission had no power to award reparation on that part of the rates here in question which were established pursuant to order of the Interstate Commerce Commission.

Only part of the rates on which reparation was awarded were established by the mandatory order of the Interstate Commerce Commission. The period for which reparation was awarded was from October 28, 1920 to February 15, 1922 (R. 222). The rate established by the mandatory order was in effect from February 19, 1921, to February 15, 1922 (R. 168, 170).

The mandatory rate here in question was one of 98¢ per ton for shipment of common brick in carloads from Bernice, Illinois, to points within the Chicago Switching District, and was established following a mandatory general increase of 40% ordered by the Interstate Commerce Commission, pursuant to which the rate of 70¢ charged on the effective date of Sec. 208(a) of the Transportation Act, 1920, was increased. The history of the rate changes leading up to the establishment of this rate, which has heretofore been set forth in the statement of facts, may be succinctly restated as follows:

1. The Chicago Switching District and its adjoining territory lie in both the State of Illinois and the State of Indiana and therefore intrastate and interstate rates from points within that district to adjoining points are necessarily very closely related.

2. The Interstate Commerce Commission, in *Ex Parte* 74, 58 Int. Com. Rep. 220, had authorized the increase of all interstate rates in the Eastern District by 40%, whereas the Illinois Commerce Commission, in its case number 10620, had authorized increase of Illinois rates only 35%. Consequently there were in effect two rates between points within the switching district, one interstate and one intrastate. There were also in effect two rates between Bernice and points within the switching district, an interstate rate of 98¢, and an intrastate rate of 94½¢. Such a situation discriminates against interstate commerce. *Illinois Commerce Commission* v. *United States*, 292 U. S. 474.

3. The Interstate Commerce Commission on January 11, 1921, in the case of *Re Intrastate Rates within the State of Illinois* Docket 11703, 60 Int. Com. Rep. 92 (R. 152), ordered petitioner and other railroads "to establish, put in force, and maintain rates and charges for freight services and for

the transportation of milk and cream in intrastate commerce within the State of Illinois, which shall exceed the rates and charges of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, now in effect, under *Ex Parte* 74," (R. 170). The Commission further ordered that this order in Docket 11703 should "remain in force until the further order of this commission in the premises." Thereby petitioner was compelled to establish the higher intrastate rates above mentioned. The order in *Ex Parte* 74 had been permissive only, but the later order *in re Intrastate Rates within the State of Illinois* made the Illinois intrastate increase mandatory. A mandatory order raising intrastate rates is no less mandatory because it is based on rates previously established by a permissive interstate order. *United States* v. *Louisiana*, 290 U. S. 70. The Interstate Commerce Commission found that the interstate rates previously established in *Ex Parte* 74 were reasonable, and that the lower intrastate rates unreasonably discriminated against interstate commerce (R. 167). The order based on such findings is not subject to attack here, because the United States and the Interstate Commerce Commission are not parties (*New York* v. *United States*, 257 U. S. 591, 600); and because the evidence before the Interstate Commerce Commission is not in this record (*Nashville, Chattanooga & St. Louis Railroad Company* v. *Tennessee*, 262 U. S. 318, 323-324).

4. The Interstate Commerce Commission next considered the very transportation question here involved in *Illinois Brick Company* v. *Director General, as agent, Pennsylvania Railroad Western Lines, et al.*, Docket 11317 (R. 73, 81), although the period for which the rates over this route were in question was prior to the period of reparation in this case. The Interstate Commerce Commission found in its

report in the Illinois Brick Company case that, without taking into account the 40% increase granted in *Ex Parte* 74 a rate of 70¢ per ton on brick from Bernice to interstate destinations within the Chicago Switching District was not and would not be unreasonable, but that the rate should not exceed the rates within the district by more than 10¢ per ton. The 70¢ rate was found to be reasonable in said report filed by the Interstate Commerce Commission on October 27, 1921, during the very period for which reparation was here granted; yet the Illinois Commerce Commission has by its order retroactively reduced the intrastate rate during that period to 50¢.

It is well established that in order to preserve interstate commerce, the Federal Government necessarily has to control the relation between interstate and intrastate rates, as a relation. *Shreveport Case* (*Houston, E. & W. T. Ry. Co., et al.*, v. *United States et al.*), 234 U. S. 342, 354. The Interstate Commerce Commission, *In re Intrastate Rates within the State of Illinois,* found the necessary relationship between Illinois intrastate rates and interstate rates to exist and required them to be equalized.

In exercising the authority to control this relation, Congress, in the Transportation Act, 1920, has bestowed upon the Interstate Commerce Commission two sources of its power to meet the two evils which require correction. One power is for the benefit of the shippers and is intended to prevent specific discriminations between specific routes. The other power is for the benefit of the carriers and is intended to permit them to earn a fair return on all their business and thus perform their public duty. This court, in *Railroad Commission of Wisconsin* v. *Chicago, Burlington and Quincy Railroad Company,* 257 U. S. 563, has distinguished between orders of the Interstate Commerce Commission under said powers as follows:

(a) Orders based on preference as between persons or localities in intrastate commerce and interstate commerce (Interstate Commerce Act, Sec. 13 (4), first clause: 49 U. S. C. A., Sec. 13 (4). Since the authority arises only from preferences as to specific persons or localities, the order based thereon is effective only insofar as such specific preferences are found by the Interstate Commerce Commission to exist. *American Express Company* v. *South Dakota ex rel. Caldwell,* 244 U. S. 617; *Illinois Central Railroad Company* v. *Public Utilities Commission of Illinois,* 245 U. S. 493.

(b) Orders based on discrimination against interstate commerce as a whole (Interstate Commerce Act, Sec. 13 (4) and 15a (2)). This power is for the benefit of the carriers, and enables the Commission to raise intrastate rates under Sec. 13 (4) to enable the carriers to earn a fair return under Sec. 15a (2) (as said section read prior to the amendment of June 16, 1933), even though the Commission does not make specific findings of discrimination on all rates. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563. It is sufficient for the Commission to find generally that intrastate rates increased under this power will be reasonable, since to require it to find on each individual rate would prevent effective action. *United States* v. *Louisiana,* 290 U. S. 70, 75-76.

The orders of the Interstate Commerce Commission here involved, namely, *Ex parte* 74, 58 Int. Com. Rep. 220, and *Re Intrastate Rates within the State of Illinois,* Docket 11703, 60 Int. Com. Rep. 92, were entered under the second power above mentioned, to permit the carriers to earn a fair return, and to prevent discrimination against interstate commerce as a whole.

The authority of a state commission after the entry of such an order is the question here. The state commission

may seek to evade the order in one or more of the following ways:

(1) The state commission may seek to maintain the pre-existing level of intrastate rates as a whole. Such action is clearly indefensible. The state commission will be enjoined therefrom on suit of the interested railroads (*Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563; and the state commission will be denied an injunction against enforcement of the rates prescribed by the Interstate Commerce Commission (*New York* v. *United States,* 257 U. S. 591).

(2) The state commission may seek to order prospective reductions of individual intrastate rates. Such reductions recognize the paramount authority of the Interstate Commerce Commission and may be permissible because they do not penalize the carrier for obedience to its order, and because they permit supervision by the Interstate Commerce Commission if necessary. *Railroad Commission of Wisconsin* v. *Chicago, Burlington and Quincy Railroad Company, supra.* Whether or not a state commission has such prospective power is not in issue in the instant case because the order of the state commission here complained of is not a legislative order fixing rates, but is a quasi judicial order awarding reparation. Nevertheless, even in case of prospective changes the proper procedure is to apply first to the Interstate Commerce Commission, requesting it to suspend the operation of its intrastate rate order insofar as it affects isolated rates (*Georgia Public Service Commission* v. *United States,* 283 U. S. 765, 772), and not to leave that Commission in ignorance of the fate of its order, while a conflict is precipitated by applying first to a state commission.

(3) The State commission may seek to award reparation based on individual intrastate rates as established and such

is the instant case. This Court has never, so far as we can determine, expressed itself on this point directly; but it is essential to the maintenance of federal authority over interstate commerce that such assumption of power by the State be denied.

The intrastate rates established by the Interstate Commerce Commission by its order in *Re Intrastate Rates within the State of Illinois, supra,* were mandatory upon the carriers, as reference to the order of the Commission will show. But they were also mandatory by virtue of the statute under which the Commission acted. This statute is Section 13 (4) of the Interstate Commerce Act, as amended by the Transportation Act, 1920 (49 U. S. C. A., Sec. 13 (4)). The paragraph of the statute referred to authorizes this general increase, as well as orders designed to remove specific discrimination. The section concludes by providing: "Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." In the sweeping language of this statutory mandate there is no discrimination between general orders for revenue purposes, such as the one in this case, and orders relating to particular discriminations. Obedience to both is equally enjoined upon the carriers. "The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of a court. It would have exposed itself to suits and penalties, both criminal and civil, if it had followed such a path." *Atlantic Coast Line Railroad Company* v. *Florida,* 295 U. S. 301, 311. The Interstate Commerce Commission's order was no less binding on petitioner because the Commission acted on evidence deemed typical of the entire intrastate rate situation, and did not refer to the specific rate here involved; for only in

that way can the Commission fulfill its duties under Section 13 (4). *United States* v. *Louisiana*, 290 U. S. 70, 75; *Georgia Pub. Serv. Com.* v. *U. S.*, 283 U. S. 765, 774; *The New England Divisions Case (Akron C. & Y. Ry. Co.* v. *United States)*, 261 U. S. 184, 197. If modifications are to be made in specific instances, they must be made by the Interstate Commerce Commission. This court has held that the power granted to that Commission to modify specific interstate rates, after an order is entered under Sec. 15a (2) (as said section read prior to June 16, 1933), must necessarily be implied as to intrastate rates in orders entered under Section 13 (4). *United States* v. *Louisiana*, 290 U. S. 70, 79. Since the power of modification is granted to the Interstate Commerce Commission, it is necessarily withheld from the state commissions, at least as far as award of reparation is concerned.

Yet if the award of reparation made by the Illinois Commerce Commission and upheld by its courts in the instant case be permitted to stand, the rates charged, which were not only lawful but *enjoined* by the Interstate Commerce Commission, in effect will be held unlawful and the carrier will have been subjected to penalties for its obedience. Either the petitioner was not bound to observe orders of the Interstate Commerce Commission at all or if so bound it should be protected in its obedience. The same act cannot be at once lawful and subject to reparation, for in such case "the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards, and yet continuing to be the legal rate, obligatory on both carrier and shipper." (*Robinson* v. *Baltimore & Ohio Railroad Company*, 222 U. S. 506, 511.

Secondly, the Illinois Commission's award should not be permitted to stand because the Interstate Commerce Commission cannot protect its order against such attacks. We have conceded above that it may be the law that a State

commission has the power to establish a *prospective* intrastate rate in one or a few instances different than that established by the Interstate Commerce Commission, because such action would be subject to the control of the Interstate Commerce Commission, since it could enter another order directly affecting the specific rates fixed by the State commission; but to permit a State commission to award *reparation* based on a lower rate than that established by a mandatory order of the Interstate Commerce Commission cannot be permitted, because the Interstate Commerce Commission can exercise no power over the order of the State commission awarding reparation, that being a quasi-judicial order. The power of the Interstate Commerce Commission over intrastate rates and its authority over State commissions is defined in said Section 13 (4). That section does not, and probably could not, authorize the Interstae Commerce Commission to attack the State commission's order directly, but only authorizes it to attack the order indirectly, by requiring the railroad to do something different. The railroad is then under the necessity of obeying the superior power. No authority is granted in that section to prevent the enforcement of a reparation order of a State commission; for the reparation order is enforcible through the State courts, and the Interstate Commerce Commission cannot interfere with the judicial process in those courts. The Interstate Commerce Commission can direct the establishment of certain rates, regardless of the action of the State commission and courts; but it cannot forbid the railroads to pay a money judgment entered by a State court, even though the evidence before the court was an invalid order of the State commission. The only remedy is appeal to this Court from the State court's judgment, as is done in this case. Therefore, if the Illinois Commerce Commission can award reparation in this case, the order of the Interstate Commerce Commission

preventing discrimination by means of lower intrastate rates is wholly nullified. There is no reason why the Illinois Commerce Commission could not, if it saw fit, award reparation on the majority of rates in the State of Illinois, and thus retroactively restore the discrimination against interstate commerce removed by the Interstate Commerce Commission's order.

Furthermore, if the state commission can, after the Interstate Commerce Commission has *withdrawn* the exercise of its power, award reparation, thus reaching back to the time that power was in effect, then it is equally logical that the Interstate Commerce Commission, upon *assumption* of such power over intrastate rates by reason of an existing discrimination, should by award of reparation reach back into the period when the rates were exclusively under state control. Yet it is the established rule that when the Interstate Commerce Commission establishes an intrastate scale of rates, "the substituted schedule is prospective only and power has not been granted in such circumstances to give reparation for the past." *Atlantic Coast Line Railroad Company* v. *Florida*, 295 U. S. 301, 311.

The cases of *Eagle Cotton Oil Company* v. *Southern Railway Company*, 47 F. (2d) 1006, reversed 51 F. (2d) 443, certiorari denied, 284 U. S. 675, and *Texas and P. Ry. Co.* v. *Louisiana Oil Refining Corporation*, 7 Fed. Sup. 1012, 76 F. (2d) 465, certiorari denied, 294 U. S. 767, are not in point here. The Circuit Court of Appeals there held only that where certain *interstate* rates were *permitted* to be charged by general orders of the Interstate Commerce Commission, the same Commission was not prevented from awarding reparation. The present case differs from the cases cited in two important respects: (a) Here we deal with the intrastate rate, and the question is of the power

of the *State* commission to disregard the order of the *interstate* commission, not the power of the interstate commission to amend its own order. The maintenance of Federal supremacy was not in any way involved in the cited cases; due process, not the power over commerce, was the question. (b) Here the rate was mandatory, whereas in the cited cases it was only permissive.

The state courts have sustained an attempt by the Illinois Commerce Commission to invade a field occupied by the Federal power, in derogation of the paramount right of Congress under the constitution of the United States.

II.

The Illinois Commerce Commission had no power to award reparation on that part of the rates here in question which were previously authorized by it.

Rates of 30¢ per ton on common brick shipments within the Chicago Switching District, and 70¢ per ton on shipments from Bernice to points within the District, had been established under Federal control and were in effect on and after the effective date of Sec. 208 (a) of the Transportation Act, 1920. Such rates were applicable to both interstate and intrastate shipments. Following the decision of the Interstate Commerce Commission in *Ex parte 74*, effective August 26, 1920, which increased interstate rates in Illinois by 40%, the Illinois Commerce Commission entered an order in its case No. 10620 authorizing a general increase in intrastate freight rates of 33⅓%, which was subsequently increased by it to 35%. Thereby the previous rate of 30¢ within the district became 40¢ and 42¢, and the rate of 70¢ from Bernice became 93½¢ and 94½¢. The latter rates were in effect during that part of the reparation period here in question extending from October 28, 1920, to February 19, 1921. On the last mentioned date the mandatory order of the Interstate Com-

merce Commission in *Re Intrastate Rates within the State of Illinois,* Docket 11703, (P 163) raising the intrastate rates 40% became effective. The rates established and exacted under the Interstate Commerce Commission order direct have been considered under the preceding point. Here we are considering only the earlier rates exacted pursuant to the orders of the Illinois Commerce Commission.

The Illinois Commerce Commission, by its order of reparation in effect retroactively has reduced its own previously established rates from 93½¢ and 94½¢ to 50¢. It is settled that the Interstate Commerce Commission has no power to award reparation on rates authorized by it (*Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railway Company,* 284 U. S. 370, even although decision was rested on statutory rather than on constitutional grounds (*Great Northern Railway Company* v. *Sunburst Oil & Refining Company,* 287 U. S. 358, 362); and courts of final resort of many of the States likewise have held that their state commissions have no such authority.[1] The

Footnote: (1) *Texas Steel Company* v. *Fort Worth and Denver City Railway Company, et al,* Texas Civil Appeals, 45 S. W. (2d) 794; *T. R. Miller Mill Company* v. *Louisville & Nashville Railroad Company,* 207 Ala. 253, 92 So. 797; *Texas & Pacific Railway Company* v. *Railroad Commission,* 137 La. 1059, 69 So. 837; *E. L. Young Heading Company* v. *Payne,* 127 Miss. 48, 89 So. 782; *Utah-Idaho Central Railroad Company* v. *Public Utilities Commission,* 64 Utah 54, 227 Pac. 1025; *Northern Pacific Railway Company* v. *Department of Public Works,* 136 Wash. 389, 240 Pac. 362; *Montana Horse Products Company* v. *Great Northern Railway Company,* 91 Mont. 194, 7 Pac. (2d) 919; *Sunburst Oil & Refining Company* v. *Great Northern Railway Company,* 91 Mont. 216, 7 Pac. (2d) 927, affirmed 287 U. S. 358; *St. Louis-San Francisco Railway Company* v. *State,* 155 Okla. 236, 8 Pac. (2d) 744; *Mathieson Alkali Works* v. *Norfolk & Western Railway Company, et al.,* 147 Va. 425, 137 S. E. 608.

question, prior to the instant proceeding, had not been passed on in Illinois.

The question here presented was not foreclosed by this Court in *Great Northern Railway Company* v. *Sunburst Oil & Refining Company,* 287 U. S. 358. The decision there, permitting award of reparation on an approved rate, was based squarely on the fact that the State court, prior to the time the charges were collected, had stated that reparation could be awarded on an approved rate. This Court pointed out that the State court's prior decision had written into the statute a notice that authorized payments were subject to refund, and such notice had entered into the contract of carriage at its inception.

In view of the history of the rates and the decisions above mentioned, the following questions are presented:

(1) To what extent, if any, was notice given to petitioner by decisions of the Illinois courts or the Illinois Commerce Commission, or by Statutes of the State of Illinois, that reparation might be awarded under the present circumstances?

(2) If no notice had been given that rates in effect on March 1, 1920, the effective date of the Transportation Act, 1920, were subject to reparation, were such rates nevertheless subject to reparation on the ground that it was a carrier-made rate?

As to the first question, analysis will show that the most that may be said is that rates established pursuant to increases authorized by the Illinois Commerce Commission in Docket 10620 were subject to reparation only to the extent of the increases there authorized.

The Illinois Statutes concerning the regulation of public utilities gave no notice that an approved rate was subject to reduction. Sections 32 and 38 of "An Act Concerning Public Utilities" (Cahill's Illinois Statutes, Chap. 111a,

Secs. 47, and 53; Smith-Hurd's Illinois Statutes, Chap. 111⅔, Secs. 32 and 38), provided that all rates or other charges by a public utility should be just and reasonable, and every unjust or unreasonable charge was prohibited and declared unlawful; and that no public utility should grant any preference or advantage or subject any person to any prejudice or disadvantage, and should not establish or maintain any unreasonable differences as to rates and charges. There is no notice in the text of these sections alone that approved rates could be held to fall under their ban. Section 72 of the same act (Cahill's Illinois Statutes, Chap. 111a, Sec. 91, Smith-Hurd's Illinois Statutes, Chap. 111⅔, Sec. 76), under which this proceeding is brought, provides simply that when "the Commission finds after a hearing that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity, or service, the Commission may award due reparation."

As above stated, there were no cases in Illinois until the present wherein the question at bar had been adjudged. The only other ground of notice to petitioner consists of the terms of the orders entered in Illinois Commerce Commission Docket 10620. The Illinois Commerce Commission in that case reserved jurisdiction to reduce only the increases authorized in that order (R. 150). Giving this reservation all possible effect, in spite of the fact that a similar declaration was held ineffective by this Court in *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railway Company, supra,* it still only includes reduction to the extent of the 33⅓% and 35% increases there authorized; whereas the State court here has approved reduction not only to the extent of such increase, but also below the pre-existing rate established by the Director General and continued in effect by Section 208 (a) of the Transportation Act, 1920.

This attempt of the Commission and the State court to reach back and control a pre-existing rate which had only

been increased, and had certainly at least been impliedly approved by the increase as not too high, distinguishes this case from *Eagle Cotton Oil Company* v. *Southern Railway Company,* 51 F. (2d) 443, certiorari denied 46 U. S. 675, and *Texas & Pacific Railway Company* v. *Louisiana Oil Refining Corporation,* 76 F. (2d) 465, certiorari denied, 294 U. S. 767. Denial of certiorari in those cases, of course, did not approve the lower courts' opinions. The cases cited necessarily decided only that the general increase of rates authorized by the Interstate Commerce Commission in *Ex Parte 74,* and other general orders, was subject to reparation *to the extent of the increase there authorized.* They did not decide that the pre-existing rate, established by the Director General and continued in force by Section 208(a) of the Transportation Act, 1920, was subject to retroactive reduction. Thus the Federal courts, in the cases cited, stayed within the reservation of jurisdiction by the Interstate Commerce Commission, which in each case extended only to the extent of the increase authorized in the particular order. In short, in the *Eagle Cotton Oil Company* case and the *Texas & Pacific Railway Company* case, the Interstate Commerce Commission and the courts awarded reparation within the limits of the reservation of jurisdiction in *Ex Parte* 74 and the other commission cases; in the instant case, the Illinois Commerce Commission and the State court exceeded the reservation of jurisdiction in Docket 10620 and retroactively reduced the pre-existing rate.

It appears, therefore, that any notice which petitioner may have had would extend only to a reduction of the rates to the level existing before the orders in Docket 10620 were entered. This pre-existing rate was 70¢. The further reduction to 50¢ can be justified, if at all, only on the ground that the previous rate was a carrier-made rate.

The second question, therefore, is whether the rate of 70¢ in effect on February 29, 1920, the date of the enactment of the Transportation Act, 1920, was carrier-made.

A brief analysis will show that the rates thus established were beyond the control of the carriers. Section 10 of the Act of March 21, 1918 (Fed. Stat. Ann., 1918 Supp., p. 763) provided that during the period of Federal control, the President might initiate rates, fares, charges, etc., by filing the same with the Interstate Commerce Commission, and said rates, fares, charges, etc., should not be suspended by the Commission pending final determination. In construing the meaning of this provision, this Court has stated (*Missouri Pacific Railroad Company* v. *Boone,* 270 U. S. 466, 469): "The existing right of the carriers to initiate rates was transferred by the second paragraph of Section 10 of the Federal Control Act to the Director General, with three modifications". The modifications mentioned do not affect the present argument.

It was by virtue of orders entered in General Order No. 28 and Freight Rate Authority 1887 that the difference existing on the effective date of the Transportation Act was created. These orders, as this Court said, were made by virtue of the transfer to the Director General of the existing right of the carriers to initiate rates. They were directions of the Director General to his officials (*Missouri Pacific Railroad Company* v. *Boone, supra,* 270 U. S. at page 470, note). It cannot, therefore, be claimed that these rates in their origin were carrier-made.

By Section 208(a) of the Transportation Act, 1920 (41 Statutes at Large, 464, Fed. Stat. Ann., 1920 Supp., p. 80), it was provided that all rates, fares, and charges in effect on February 29th, 1920, "shall continue in force and effect until thereafter changed by State or Federal Authority respectively, or pursuant to authority of law;". The rates

thus continued were intrastate rates as well as interstate rates. *Missouri Pacific Railway Company* v. *Boone, supra.* The court there said, page 470:

> "It was by virtue of the ordinary corporate power of carriers to establish rates, so transferred to the Director General, that the rates, fares, charges, classifications, regulations and practices referred to in the first clause of Section 208(a) had, in the main, been established."

The difference in the rates on brick had been established by an order of the Director General specifically relating to brick, namely Freight Rate Authority 1887. All that the Illinois Commerce Commission did, after February 29, 1920, was to increase rates generally by 33-1/3% and 35%. Yet it now claims, and the state court has sustained it in that claim, that this *increase* vested in it an authority to order a subsequent decrease wiping out the increase and reducing the pre-existing rate.

The security of the railroad rate structure requires that the carrier know as exactly as possible when rates lawfully collected may subsequently be held unlawful by the same commission. The vital question here is whether an increase authorized by the State commission based on a mandatory rate ordered by the Director General, constitutes notice to the carrier that not only the increase, but also the previously ordered rate, both may be nullified by a subsequently granted reparation. Such an assertion of power impairs vested rights and denies due process of law.

III.

The judgment of the court below denied petitioner due process of law, whether that judgment was based on the holding that the court would not review the evidence before the Illinois Commerce Commission, or whether it was based on the holding that the evidence before the Illinois Commerce Commission supported its award.

The Appellate Court of Illinois, First District, has affirmed the judgment of the Circuit Court of Cook County, Illinois, approving the order of reparation entered by the Illinois Commerce Commission and sued on in this case, although the undisputed evidence before said Commission and before the court showed that the net rate thus retroactively established was much lower than the cost of moving the freight. The Appellate Court said that the order of the Illinois Commerce Commission of November 7, 1923, definitely and finally determined the just and reasonable rate for the shipment here involved and held as follows: "The order of the Illinois Commerce Commission of that date was legislative in character and, we hold, final and appealable. Defendant did not appeal and is therefore precluded under Section 68 (of the Illinois Public Utilities Act) from contesting that order on the merits." (R. 231). In spite of this holding, which obviated the necessity of considering the evidence before the Commission, the court went on to say: "Nevertheless, we have examined the evidence and think it sufficient to sustain the findings." (R. 231).

The Appellate Court thus states two grounds for its decision, first, that it does not have to review the evidence, and, second, that it has reviewed the evidence and the evidence is sufficient. Both grounds raise Federal questions. If the basis of the decision is a construction of Section 68

of the Illinois Public Utilities Act, the effect of which was that petitioner was denied an opportunity for hearing on the merits, then the court has denied petitioner due process of law. If the basis of the decision is that the evidence when reviewed is sufficient, the holding likewise denies petitioner due process of law, because the undisputed evidence shows that the rate established by the reparation award was much lower than the cost of moving the freight. These two grounds will be dealt with in the succeeding subpoints.

A. *This court will review the evidence before the Illinois Commerce Commission, or will require the State Court to review it.*

The question here presented is whether a state court may overrule the previous decision in that State as to the proper method of obtaining review in the courts of an order of the State Commerce Commission, under such circumstances that a utility is denied all opportunity of judicial review on the merits.

Section 68 of the Illinois statute, "An Act Concerning Public Utilities," in force July 1, 1921 (Cahill's Illinois Statutes, Chapter 111a, Section 87; Smith-Hurd's Illinois Statutes, Chapter 111⅔, Section 72) provided, at the time of the proceedings before the Illinois Commerce Commission which are here involved, that within thirty days after the service of an order of the Commission refusing a rehearing, or within thirty days after the service of any *final order* of the Commission after a rehearing, any person affected may appeal to the state circuit court. Said section further provided that when no appeal is taken, parties affected shall be deemed to have waived the right to have the merits of said controversy reviewed by a court.

The Supreme Court of Illinois in *Terminal Railroad Association of St. Louis* v. *Public Utilities Commission*, 304

Ill. 312, 136 N. E. 797, which was decided October 21, 1922, prior to the proceedings before the Illinois Commerce Commission here involved, had construed Section 68 of "An Act to Provide for the Regulation of Public Utilities," in force January 1, 1914, with reference to appeals from reparation proceedings before the Illinois Public Utilities Commission. Said Commission was the predecessor of the Illinois Commerce Commission, and exercised practically identical powers of regulation, including the power to award reparation. Section 68 of the earlier act provided for appeal from an order of said Public Utilities Commission made after a final hearing. It was thus in substance the same as Section 68 of the present Act.

The Illinois Supreme Court held in the case cited that appeal from the Public Utilities Commission to the courts, under Section 68 of "An Act to Provide for the Regulation of Public Utilities," lay only from final orders of said Commission. The court by construction thus gave the prior Act identical meaning with the present one in this respect. The court further held that an award of reparation by the Commission was not a final and appealable order, because (the court said) in a suit on the award the carrier is free to open the entire record and procure a judgment of the court in its favor. It necessarily followed from the decision that the only way in which a utility ordered to pay reparation could secure a judicial review of such order was to await suit on the award and then present its defense. No other review was provided by the Act.

Relying on this decision, petitioner permitted the order of the Illinois Commerce Commission, finding reparation due to respondent and reserving jurisdiction to determine the amount, to be entered against it November 7, 1923, and the further order awarding reparation to be entered against it April 16, 1924, without seeking an appeal. (See R. 32, 38 for further details of said orders.)

That this was proper is evidenced by the fact that up to the present time no further attempt to obtain direct review of reparation orders appears in the reports of the Illinois Courts of review. The decision in *The Terminal Railroad Association* case will still be considered authority by all utilities, because the Appellate Court's opinion in the present case has not been designated by it for publication.

The cases of *Commerce Commission* v. *Cleveland, Cincinnati, Chicago and St. Louis Railway Company,* 320 Ill. 214, 150 N. E. 678, decided February 18, 1926, and *Chicago and Eastern Illinois Railway Company* v. *Commerce Commission,* 341 Ill. 277, 173 N. E. 380, decided October 25, 1930, both of which were decided long after the time for appeal from the Illinois Commerce Commission's order of November 7, 1923 in this case had expired, could not, of course, have given petitioner any notice as to its proper course of action. However, insofar as these cases are relevant they tend to confirm the holding in *The Terminal Railroad Association of St. Louis* v. *The Public Utilities Commission, supra.* In the *Cleveland, Cincinnati, Chicago and St. Louis Railway Company* case appeal was taken from an order directing the establishment of rates for the future and requiring the filing of a verified statement as to the amount of reparation due. In the *Chicago and Eastern Illinois Railway Company* case appeal was taken from an order establishing future rates and also awarding reparation. Since the order establishing future rates was a final and appealable order under the earlier decision, the mere joining with it of a reparation order could not prevent appeal. There was no order establishing rates entered at any time in the present proceeding.

When the Appellate Court of Illinois delivered its opinion in this case, holding that petitioner should have appealed from the Illinois Commerce Commission, the time for appeal had long since expired. Under Sections 67 and 68 of

"An Act Concerning Public Utilities" (Cahill's Illinois Statutes, Chap. 111a, Sec. 87; Smith-Hurd's Illinois Statutes, Chap. 111⅔, Sec. 72), an appeal from an order of the Commission must be perfected within a maximum of 80 days after the original order.

The attempt of the Appellate Court to hold now that petitioner should have followed a method of review which the existing decision at the time prevented should not prevent review by this Court of the evidence before the Illinois Commerce Commission if such review should be necessary.

In *New York Central Railroad Company* v. *New York & Pennsylvania Company,* 271 U. S. 124, the State commission had found certain railroad rates unreasonable, and stated that upon presentation of a petition and data, it would award reparation. Reparation was afterwards awarded and the railroads appealed. The State court held that the railroads had waived their rights by failing to appeal from the earlier decision of the commission. This Court said that failure to appeal from the former order was no bar, and that it would not be reasonable to hold the railroads precluded from getting the protection this Court owed them by having failed to go as far as they now learn they might have gone in a previous State proceedings which did not infringe their rights and which could not be brought to this Court. So in the instant case, the attempt of the State court to prevent review on the merits is not reasonable, and cannot prevent this Court from reviewing the case on constitutional grounds.

However, if this Court should be of the opinion that it cannot review the evidence at the present stage of these proceedings, because of the Appellate Court's holding that it was not obligated to undertake such review, then this Court must reverse the judgment of the Appellate Court and remand the case, under the rule stated in *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673;

Saunders v. *Shaw*, 244 U. S. 317; *Missouri ex rel Missouri Insurance Company* v. *Gehner*, 281 U. S. 313; *Ohio ex rel Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74; and *Great Northern Ry. Co.* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358.

In the belief that this Court will, under the decision in *New York Central Railroad Co.* v. *New York & Pennsylvania Co., supra,* review the evidence before the Commission, we shall proceed to examine that evidence insofar as it relates to the confiscatory character of the rate established by the reparation order.

B. *The evidence before the Illinois Commerce Commission showed without contradiction that the rate fixed by the order here involved is confiscatory.*

The Appellate Court of Illinois in its opinion in this case said that it had examined the evidence before the Illinois Commerce Commission and thought it sufficient to sustain the findings (R. 231). The court thus necessarily held that the order of the commission did not establish a confiscatory rate. The undisputed evidence is to the contrary.

Consideration of this question involves consideration of the facts before the Illinois Commerce Commission and the lower court, but this court will review the evidence of the State court on a question of fact when a Federal right has been denied as the result of a finding wholly unsupported by evidence. *Missouri Pacific Ry. Co.* v. *North Dakota ex rel McCue*, 236 U. S. 585.

The Commission found that Pennsylvania Railroad Company had introduced a cost study and concluded: "It is also clear *from the cost study* that the rate of 50 cents per ton for single line application at the time the shipments here under consideration moved, provides adequate revenue for the transportation of brick from Bernice, Illinois,

to points of destination within the Chicago switching district and intermediate points covered by this complaint." (R. 36. Italics ours.) The Commission made no findings questioning any of the elements of cost in the cost study.

Not only did the Commission thus rely specifically on the cost study, but the cost study and the testimony of the railroad's expert witness based thereon was the only evidence in the record as to the cost of moving the freight. The Commission's conclusion and its award must, therefore, stand or fall by the cost study.

The formula used in making the cost study was the Coverston-Saur formula (R. 88), which has been used in a number of cases before the Interstate Commerce Commission (R. 88), including *Illinois Brick Company* v. *Director-General,* Docket 11317, 64 Int. Com. Rep. 273 (R. 62), and *Switching Rates in Chicago Switching District,* No. 19610, 177 Int. Com. Rep. 669, 195 Int. Com. Rep. 89, affirmed in *Illinois Commerce Commission* v. *United States,* 282 U. S. 474.

The Pennsylvania Railroad Company's witness before the Illinois Commerce Commission, J. W. La Rue, qualified without objection as an expert in making cost studies. He stated that he had made a cost study of the terminal costs involved in the movement of freight in and around Chicago district and in and around Bernice (R. 61.) He described in detail the method by which the cost study was made up. The figures and computations on which his testimony was based were received in evidence (R. 62). The cost study formula was received in evidence as also was the cost study formula (R. 61, 62, 88). The witness concluded from his study that the terminal cost was 44.4¢ per ton at the time the study was made (R. 65). The witness stated that the formula produces generally 85% or 95% of the cost of the terminal service (R. 61). In order to include the omitted costs, taxes, in-

terest on bonded indebtedness, etc., the witness applied an operating ratio of 66⅔% R. 65). By application of the ratio of 66⅔% the witness arrived at a total terminal cost of 66.6¢ per net ton (R. 65).

In addition to the terminal movement, handled by yard crews, there was also involved a road-haul movement from Bernice, handled by a local freight train. The cost of the road haul movement, which was not included in the cost study (R. 64), was estimated by the witness at 30¢ per ton more (R. 65). Furthermore, costs had increased between the time the study was made and the period for which reparation was awarded (R. 65).

The undisputed evidence, therefore, is that the cost of moving the freight at the time the shipments in question moved was more than 96.6¢ per ton. Even if we assume errors in the cost study which the Commission did not find, still it cannot be disputed that the record discloses that the cost of this movement is more than 50¢ per ton. Yet the Illinois Commerce Commission by its award of reparation has retroactively established a rate of 50¢ per ton. Its decision is contrary to the decision of this court in *Northern Pacific Ry. Co.* v. *Department of Public Works of Washington,* 268 U. S. 39. There the court held that an order fixing railroad rates, entered by an administrative tribunal and based on a finding made without evidence, is an arbitrary act against which courts afford relief and is a denial of due process. This court has further held that a rate so established is confiscatory whether or not the railroad earns a reasonable profit on its intrastate business as a whole. *Vandalia Railroad* v. *Schnull,* 255 U. S. 113; *Chicago, Milwaukee, & St. Paul Railroad Co.* v. *Public Utilities Commission,* 274 U. S. 344; *Ann Arbor Railroad Co.* v. *United States,* 281 U. S. 658. The cases cited relate to the establishment of future rates, whereas in this case reparation was awarded for the past. The difference, however, so far as

it is important, tends but to emphasize the arbitrary character of the Commission's order. Future costs are necessarily a matter of estimate, as to which experience can only furnish an uncertain guide, leaving a wide range of permissible discretion in fixing rates. Prospective orders are also subject to alteration before much damage is done. Past costs, on the contrary, are susceptible of relatively exact proof, and a reparation award disregarding them is not open to the alleviating effect of further experience. "The actual experience of the Company is more convincing than tabulations of estimates." *Lindheimer* v. *Illinois Bell Telephone Company,* 292 U. S. 151, 163.

The difficulty with the proof as to costs which this court found in *Lindheimer* v. *Illinois Bell Telephone Company,* supra, viz., that adequate earnings had been obtained on allegedly confiscatory rates—is not present here. It is true that the rate here involved was voluntarily reduced to 50¢ on February 16, 1922 (R. 52). But there is no evidence tending to show that the latter rate was compensatory; and a railroad, competing with other railroads and trucks for short hauls is often unable to establish compensatory rates. Experience of the last few years has shown many instances in which railroad rates failed to yield adequate return, although they were as high as the traffic would bear. Such rates may be voluntarily established; they cannot be imposed against the will of the railroads to benefit particular localities. *Northern Pacific Railway Co.* v. *North Dakota ex rel. McCue,* 236 U. S. 585, 598.

In summary, therefore, the court below cannot, under the due process clause, prevent this court from reviewing the evidence before the Illinois Commerce Commission on the merits; and on such review it will appear from the only evidence submitted that the last rate of 50 cents per ton which is in effect established by the reparation order

is substantially less than the cost of moving the freight. It is confiscatory and as attempted to be enforced offends against the due process provision of the Fourteenth Amendment.

It is respectfully submitted upon the strength of the reasoning in *Arizona Grocery Co.* v. *Atchinson, Topeka & Santa Fe Ry. Co..*, 284 U. S. 370, that the judgment of the Appellate Court of the State of Illinois should be reversed and the case remanded with an instruction for further proceedings to the end that the proceedings may be finally dismissed.

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EDWARD M. BURKE,
FREDERIC D. MCKENNEY,
For Petitioner.

HENRY WOLF BIKLE,
LOESCH, SCHOFIELD, LOESCH & BURKE,
Of Counsel.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

No. 360

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

MOTION OF RESPONDENT TO DISMISS WRIT OF CERTIORARI.

ABRAHAM R. MILLER,
Counsel for Respondent.

CHICAGO LAW PRINTING CO., 111 W. MONROE STREET, CHICAGO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935.

No. 360

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Respondent.

MOTION OF RESPONDENT TO DISMISS WRIT OF CERTIORARI.

Now comes respondent, Illinois Brick Company, a corporation, by Abraham R. Miller, its counsel, and respectfully moves the Court to dismiss the writ of certiorari heretofore granted herein, and in support of said motion shows unto this Honorable Court the following facts:

1. The writ of certiorari in this cause was granted by this Honorable Court on October 14, 1935.

2. The Clerk of this Court, under date of January 22, 1936, instructed counsel to appear before this Court on

Thursday, February 6, 1936, for the argument of the above entitled cause.

3. Petitioner has not at the date of this motion filed its briefs in this Court; neither has it served respondent with any copies of said brief.

3. Petitioner has not at any time heretofore signified to this respondent that it intended to rely upon its petition for certiorari as a brief in this case, but in fact petitioner's counsel have at numerous times informed respondent's counsel that the brief which would be filed would differ in some material respects from the petition for certiorari heretofore filed herein.

4. Respondent's counsel has during the last two months repeatedly requested petitioner's Chicago counsel to expedite the filing of petitioner's briefs in order that respondent might have a fair and adequate time within which to answer the same.

5. Rule 27 of this Court provides in part as follows:

"1. The counsel for appellant or petitioner shall file with the clerk, at least three weeks before the case is called for hearing, forty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

* * *

"3. The counsel for an appellee or respondent shall file with the clerk forty printed copies of his brief, at least one week before the case is called for hearing.

* * *

"5. When, under this rule, an appellant or petitioner is in default, the court may dismiss the case; and when an appellee or respondent is in default, the court may decline to hear oral argument in his behalf."

6. The violation by petitioner of the above sections of the said Rule 27 has materially prejudiced the rights of respondent by depriving it of sufficient time within which to prepare respondent's brief and to prepare to meet petioner's contentions upon oral argument.

7. In order for respondent to file its brief within the time prescribed by Paragraph 3 of said Rule 27, it would be necessary for such briefs to be printed and mailed from Chicago not later than Tuesday, January 28, 1936, which means that respondent's brief would have to be written and printed without the opportunity to examine the arguments contained in petitioner's brief.

Wherefore, respondent respectfully moves this Honorable Court to dismiss the writ of certiorari heretofore granted herein because of said violation of Rule 27 of this Court.

ILLINOIS BRICK COMPANY,
Respondent,

By ABRAHAM R. MILLER,
Its Counsel.

Dated at Chicago, Illinois,
January 27, 1936.

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CLERK

IN THE

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OCTOBER TERM, A. D. 1935

No. 360

PENNSYLVANIA RAILROAD COMPANY,
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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

No. 360

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Appellate Court of Illinois, First District, although in writing, was not ordered published, and it is, therefore, not reported anywhere.

The Supreme Court of Illinois on the first appeal orally transferred the case to the Appellate Court because the constitutional and Federal questions had not been properly preserved, but filed no written opinion.

On the petition to the Supreme Court of Illinois for certiorari to the Appellate Court, no opinion was filed, but the writ of certiorari was denied.

Jurisdiction.

The jurisdiction of this court is invoked by petitioner under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 937, 28 U. S. C. A., Section 344).

We respectfully submit that this Honorable Court has no jurisdiction to grant the writ of certiorari prayed for by petitioner.

On December 5, 1933 the trial court (Circuit Court of Cook County, Illinois) entered a judgment for the respondent and against the petitioner upon an award of reparation previously made by the Illinois Commerce Commission. The petitioner herein instead of appealing to the Appellate Court of Illinois, which is the intermediate reviewing court in this state, appealed directly to the Supreme Court of Illinois. A direct appeal lies to the Supreme Court where constitutional questions have been raised. In that court the petitioner in its assignment of errors and in its briefs claimed that it had been deprived of its rights under the Commerce clause and the Fourteenth Amendment to the United States Constitution, as well as of rights under various sections of the Illinois constitution.

No such rights had been claimed in the trial court and the record brought up to the Supreme Court of Illinois did not disclose that such questions had been properly preserved for review. The case was argued orally before the Supreme Court of Illinois and the question of the preservation of such constitutional questions was thoroughly discussed. The Supreme Court thereupon orally

announced as stated in the Petition herein (page 20) that no constitutional questions had been properly presented to the trial court or preserved in the record for review, and therefore transferred the case to the Appellate Court.

That the Supreme Court of Illinois was correct in its refusal to consider any constitutional questions is clearly apparent from the record. The only facts disclosed by the record upon which the petitioner bases its contention that these constitutional questions were presented to the trial court are as follows:

(a) The petitioner in a notice of special defense alleged that "said rates were published and collected by said defendant pursuant and in obedience to an order entered January 11, 1921 by Interstate Commerce Commission in the proceeding designated as No. 11703 * * * that Illinois Commerce Commission is without jurisdiction or authority to penalize said defendants or to award damages or reparations against them for their said acts pursuant and in obedience to said order of Interstate Commerce Commission and that this court is likewise without such jurisdiction and authority" (R. 16-17).

(b) The petitioner introduced in evidence before the trial court the report and order of the Interstate Commerce Commission in said No. 11703 (R. 217-237).

(c) The petitioner moved to find the issues for the defendant at the close of the evidence (R. 266) and made a motion in arrest of judgment (R. 268).

We respectfully submit that in none of these three methods did the petitioner sufficiently present to the trial court the Federal questions which would give this Court jurisdiction to grant the writ of certiorari, for the following reasons:

A. The necessity of properly presenting to the trial court Federal questions which will give this Honorable Court jurisdiction to grant a writ of certiorari to the state court under Section 237 (b) of the Judicial Code is governed by the practice of the particular state where the case is tried.

Morrison v. *Watson*, 154 U. S. 111, 14 S. Ct. 995, 38 L. Ed. 927.

In the *Morrison* case this court said (U. S. p. 115):

> "If it (a title, right, privilege or immunity claimed under the constitution or a treaty or statute of the United States) was not claimed in the trial court, and therefore, *by the law and practice of the state*, as declared by its highest court, could not be considered by that court; * * * it cannot be asserted in this court." (Italics supplied.)

B. The manner in which a Federal question must be raised in the trial court in order to give this Court jurisdiction to grant certiorari is also governed by the state practice.

In *Louisville & Nashville R. Co.* v. *Woodford*, 234 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202, it was contended that the Federal questions had been sufficiently presented to the trial court because they had been argued orally. The Kentucky Code of Practice required such contentions to be in writing. This Court, in holding that it was without jurisdiction to review the decision of the Supreme Court of Kentucky, said (U. S. p. 51):

> "In making this holding, the Kentucky court but enforced a rule of practice of that state. The decisions of this court not only have repeatedly held that a Federal right, in order to be reviewable here, must be set up and denied in the state court, but have often

held that such claim of denial is not properly brought to the attention of this court where it appears that the state court declined to pass upon the question because it was not raised in the trial court, as required by the state practice."

In *Hulbert* v. *City of Chicago,* 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026, this Court was requested to review the judgment of the Supreme Court of Illinois, affirming a judgment of the County Court of Cook County confirming an assessment to defray the cost of paving a street. In the trial court the defendant filed objections to the confirming of the assessment roll, alleging that the Local Improvement Act of the State of Illinois, the ordinance passed by the City for paving the street, and the proceedings in the case were contrary to the Fourteenth Amendment to the United States Constitution because they sought to deprive the objector of property without due process of law. Upon the trial of the case the objector failed to bring these contentions to the attention of the trial court. This Court, in holding that it had no jurisdiction to review these Federal questions, said (U. S. p. 280):

"The mere claim in the objections to the confirming of the assessment, never afterwards brought to the attention of the trial court or of the supreme court, was not sufficient. There is no evidence in the record to show that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States.

• • •

"Nor was a right under the Constitution of the United States necessarily involved in the determination of the cause. And the supreme court was justified by

its rulings in omitting the consideration of rights under the Constitution of the United States. According to the practice of the court, an error not assigned is not open to review. *Berry* v. *Chicago*, 192 Ill. 154, 155, 61 N. E. 498. Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. *Keyes* v. *Kimmel*, 186 Ill. 109, 114, 57 N. E. 851. *And such rule of practice will be recognized by this court.* *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 153, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605. It follows that this court has not jurisdiction of this writ of error." (Italics supplied.)

Petitioner (Brief, page 31) contends that this Court has held that whether the Federal constitutional questions were properly raised in the trial court is itself a Federal question. The decisions on that subject mean no more than that this Court will examine the record to see whether or not the State rules of practice requiring the questions to be raised in the trial court were complied with. These decisions do not mean that this Court will not follow the State rules of practice.

Even such examination of the record by this Court will be limited merely to considering whether or not there was a reasonable ground for the decision of the State Supreme court to the effect that the State rules of practice were not properly complied with. It is only when this Court can see that the State Supreme Court sought to *evade* the Federal questions that it will overrule the State Supreme Court in that respect.

In *Louisville & Nashville R. Co.* v. *Woodford*, 234 U. S. 46; 34 S. Ct. 739; 58 L. Ed. 1202, *supra*, this Court, after holding that the State practice was controlling, further said (U. S. p. 51):

"In this case there is no reason to believe that there was an attempt on the part of the state court to evade the decision of Federal questions, duly set up, by unwarranted resort to alleged rules under local practice, and upon this point this case comes within former rulings of this court, as we have seen."

The writ of certiorari can be awarded in this case only on the basis that the Illinois Supreme Court deliberately sought to evade the Federal questions. To justify such a charge would, we respectfully submit, require very clear and convincing proof in the record. The record is wholly barren of such proof. On the contrary, as we shall demonstrate, the record clearly shows that the Supreme Court of Illinois was entirely correct in ruling that the Federal questions had not been properly preserved in the trial court.

C. Under the rules of practice prevailing in the State of Illinois, the Federal questions were not properly presented to the trial court nor properly preserved in the record for review by the Illinois Supreme Court.

The Illinois Practice Act (Cahill Ill. Rev. Stat., 1931, Ch. 110, Sec. 118), which governed the appeal from the trial court, provided as follows:

"Appeals from and writs of error to circuit courts * * * in all criminal cases above the grade of misdemeanors and cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved * * * shall be taken directly to the Supreme Court."

It has always been the well settled rule of practice in Illinois that where an appeal is taken directly to the Supreme Court under the above section of the Practice Act on the ground that the validity of a statute or the construc-

tion of the Illinois or Federal Constitution is involved, the record must clearly show that the question was presented and argued in the trial court in order to be reviewable by the Supreme Court of Illinois.

Thus in *People* v. *City of Waukegan*, 344 Ill. 60, 175 N. E. 780, the Supreme Court of Illinois said (Ill. p. 61):

> "A cause cannot be brought directly to this court from the trial court, either by appeal or writ of error, upon the ground that the validity of a statute is involved unless the record discloses that the question was presented to the trial court for decision and preserved for review."

In *Cummings* v. *The People*, 211 Ill. 392, 71 N. E. 1031, the court said (Ill. p. 402):

> "It is fundamental that the question of the constitutionality of a statute cannot properly be raised for the first time in a court of review, but must have been called to the attention of the trial court and ruled upon by it, and the person challenging its validity must have preserved proper exceptions to such ruling."

The methods by which such questions may be presented to the trial court have been defined by the Supreme Court of Illinois. These methods are as follows:

1. Where a cause of action set forth in a declaration is based upon a statute a general demurrer will call into question the validity of that statute.

Christy v. *Elliott*, 216 Ill. 31; 74 N. E. 1035, where the Court said (Ill. p. 37):

> "This court has held that the constitutionality of a statute may be raised by demurrer to the declaration. (*Shepherd* v. *City of Sullivan*, 166 Ill. 78; *Woodruff* v.

Kellyville Coal Co., 182 *id.* 480.) Here, however, no demurrer was filed to the declaration. This court has also held that the constitutionality of a statute may be raised by an objection to evidence offered under it. (*Pearson* v. *Zehr*, 125 Ill. 573.) Here, no objection was made to the introduction of any testimony by the appellant upon the ground that the statute was unconstitutional, so far as the bill of exceptions shows."

2. Objections to evidence offered under a statute upon the ground that the statute is unconstitutional will raise the constitutional question.

Christy v. *Elliott*, 216 Ill. 31; 74 N. E. 1035, *supra*.

3. In a case tried before a court without a jury, as was our case, the questions may be presented by submitting propositions of law embodying such questions.

Opaque Cloth Shade Co. v. *Veight*, 161 Ill. 337, 43 N. E. 1067, where the court said (Ill. p. 338):

"If the defendant desired to raise the question here discussed, it should have raised it in the trial court by submitting proper propositions to be held as the law of the case."

Tested by these rules, it is apparent that the Supreme Court of Illinois correctly refused to review any Federal or constitutional questions because they had not been presented to the trial court. No demurrer to the declaration was filed by the petitioner. (Even if a demurrer had been filed, the rule contended for above would not be applicable to the case at bar because the Federal or constitutional questions did not appear from the declaration itself, but required a plea and the introduction of evidence to raise them.)

The petitioner made no objections to the introduction of evidence under any Federal statute. Even if it had

made such objections, it would have been necessary expressly to state the ground of its objection.

Petitioner submitted no propositions of law embodying the Federal or constitutional questions.

The mere fact that the petitioner's special plea contained allegations under which it might have questioned the validity of the orders of the Illinois Commerce Commission under the Commerce clause of the United States Constitution or might have claimed that it was being deprived of property without due process of law under the Fourteenth Amendment to the United States Constitution is no sufficient showing that the petitioner actually did present and argue such defenses to the trial court.

Thus in *Pearson* v. *Zehr,* 125 Ill. 573, 18 N. E. 204, the court in holding that it had no jurisdiction to consider the validity of a statute, said (Ill. p. 576):

> "It is quite apparent that the validity of the statute might have been involved in this suit, as, for instance, if the plaintiff had demurred to the plea setting up the statute, or had objected to the introduction of evidence under the statute, and the court having decided against him, he had excepted to the ruling and assigned it as a cross error. But a constitutional provision designed for the protection, solely, of the property rights of the citizen may be waived by the citizen."

The record clearly discloses that at no time during the trial of the case was the trial court in any way advised or informed, nor did it in any way know or believe, that the petitioner herein was challenging the validity of any state or Federal statute or claiming a violation of its rights under either the Illinois or Federal constitution. It is certainly clear beyond any doubt that the trial court did

not *rule* upon any of such questions. *Cummings* v. *The People,* 211 Ill. 392, 71 N. E. 1031, *supra,* specifically holds that to preserve the question for review in the Supreme Court, the record must disclose not only that it was presented to and argued before the trial court, but that the trial court *ruled upon it* (See quotation from this opinion, p. 8, *supra*).

Petitioner's contention that its introduction in evidence of the report and order of the Interstate Commerce Commission in docket number 11703 raised a Federal question is so far fetched as hardly to merit reply. The first obvious answer thereto is that if the reference in the notice of special defense to such report and order is insufficient to raise the Federal question, the introduction thereof in evidence without any explanation of the purpose of its introduction is no more effective to raise such Federal question. Secondly, the introduction in evidence thereof is quite consistent with the defense that the Illinois Commission was without jurisdiction under a proper construction of the Illinois Public Utilities Act, or the general decisions of the State of Illinois, to grant reparation. Such defense would raise no Federal question.

D. Such a defense may be waived by the litigant.

See *Pearson* v. *Zehr,* 125 Ill. 573, 18 N. E. 204, *supra,* where the Supreme Court of Illinois held that the constitutional provision may be waived by not presenting the question to the trial court for its decision.

See also *Hulbert* v. *City of Chicago,* 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026, *supra,* where the defendant specifically raised the constitutional question in his pleading, but did not call it to the attention of the trial court or secure a ruling of the trial court thereon, and this Court held the question to have been waived.

Even, therefore, if the notice of special defense above quoted can be construed as actually raising the Federal questions relied on in the petition herein (and we shall hereafter show that it cannot so be construed), the record discloses that such defenses were waived by the petitioner because they were not presented to the trial court for decision in any proper manner.

E. The decisions of this Court confirm the rules of practice laid down by the Illinois Supreme Court with reference to the proper manner of raising a Federal question in the trial court.

In *Erie Railroad* v. *Purdy* 185 U. S. 148, 22 S. Ct. 605, 46 L. Ed. 847, the answers filed by the defendant in the trial court set forth that the statute relied upon in the declaration was unconstitutional and void because it was a violation of the Commerce clause of the Constitution of the United States and "because it is in violation of various other provisions of the Constitution of the United States and of the Constitution of the State of New York." This Court held that while the answer was sufficient to bring into question the validity of the statute insofar as the Commerce clause was concerned, the general reference to "other provisions of the Constitution" was not sufficient to raise the question of the validity of the statute under the Fourteenth Amendment.

In *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 20 S. Ct. 205, 44 L. Ed. 299, this Court held that claim of a right under the Commerce clause of the Federal Constitution made in an Illinois state court did not confer jurisdiction to consider a claim of a right under the Fourteenth Amendment. The court said (U. S. p. 633):

> "To justify our taking jurisdiction, the Federal question must be specially set up or claimed in the state court; the party must have the intent to invoke

> for the protection of his rights the Constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709."

In *Layton* v. *Missouri*, 187 U. S. 356, 23 S. Ct. 137, 47 L. Ed. 214, the defendant was convicted of a violation of a statute of Missouri relating to the use of chemicals in the preparation of food. The court refused to review a decision of the Supreme Court of Missouri, saying (U. S. p. 358):

> "While it appears from the proceedings on the trial and the grounds assigned for the motion for new trial, that the unconstitutionality of the act was relied on in defense, the record does not show that it was contended in the trial court that the act was in contravention of the Constitution of the United States; and it is settled that the objection in the state courts that an act of the state is 'unconstitutional and void' relates only to the power of the state legislature under the state Constitution. *Miller* v. *Cornwall R. Co.*, 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Jacobi* v. *Alabama*, 187 U. S. 133, *ante*, 106, 23 Sup. Ct. Rep. 48."

See also *Jacobi* v. *Alabama*, 187 U. S. 133, 23 S. Ct. 48, 47 L. Ed. 106, to the same effect.

With these authorities in mind a detailed examination of the Federal questions relied upon will further emphasize the correctness of the Illinois Supreme Court ruling that none of these questions was properly raised in the state courts:

1. Petitioner first contends that the case involves the construction of Sections 13(4) and 15a(2) of the Inter-

state Commerce Act (48 U. S. C. A. Sections 13(4) and 15a(2).) An inspection of the record shows that these two sections of the Interstate Commerce Act were never at any time referred to in the trial court. Certainly the allegation in the notice of special defense that the Illinois Commerce Commission was without jurisdiction or authority to award reparation does not raise the question of the construction of these sections of the Interstate Commerce Act in the manner required by the above decisions. Applying the principle enunciated in *Layton* v. *Missouri*, 187 U. S. 356, 23 S. Ct. 137, 47 L. Ed. 214, *supra*, and *Jacobi* v. *Alabama*, 187 U. S. 133, 23 S. Ct. 48, 47 L. Ed. 106, *supra*, this Court must presume that this special defense merely raised the question of the construction of the Illinois Public Utilities Act and the power of the Illinois Commerce Commission thereunder to grant reparation.

But even if it be conceded for the sake of argument that the construction of those sections of the Interstate Commerce Act were sufficiently presented to the trial court, yet the petitioner waived this defense because upon appeal to the Supreme Court of Illinois it neither assigned errors bringing into question the construction of these sections of the Interstate Commerce Act (R. 270-275), nor did it in its briefs filed with the Illinois Supreme Court, nor upon oral argument before the Supreme Court, contend that the construction of these sections was in issue.

Hulbert v. *City of Chicago*, 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026

The People v. *Cobb*, 343 Ill. 78, 83

This alleged defense is an obvious afterthought which was never at any time prior to the filing of the petition herein raised by petitioner.

Substantially the same answer may be made to petitioner's contention (Brief, p. 30) that the construction of Sec.

208 (a) of the Transportation Act, 1920, is involved. Nowhere in the record does it appear that such question was presented to the trial court, or ruled upon by it. Even if it had been so presented, the question was waived because no errors were assigned in the Supreme Court of Illinois challenging the construction of said Act.

2. Under Point II of petitioner's brief (Pages 41-42) it is contended that a violation of the Fourteenth Amendment to the Constitution and of the Commerce Clause of the Constitution is involved by reason of the alleged fact that the Illinois Commerce Commission awarded reparation on rates which were previously authorized by it. As a matter of fact, the Illinois Commerce Commission did no such thing, as we shall show later; but even if it did, no constitutional question would be involved thereby.

In *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358; 53 S. Ct. 145; 77 L. Ed. 360, this Court stated that whether or not a Railroad Commission, state or federal, has power to award reparation upon rates previously authorized by it is a question solely of the construction of the statute and does not involve any question of constitutional law. In discussing *Arizona Grocery Co.* v. *Atchison T. & S. F. R. Co.*, 284 U. S. 370; 52 S. Ct. 183; 76 L. Ed. 348, which held that where the Interstate Commerce Commission has upon complaint and after a hearing prescribed a particular rate, it cannot thereafter grant reparation for charges based upon the exaction of such rate, the Court said (U. S. p. 362):

> "The opinion of the court does not speak of the constitution, but plants itself upon the statute, and from that source and no other derives its energy. In none of its pages is there a hint, much less a holding, that a denial of due process would result from the declaration of provisional rates if the will to make

them provisional had been written into the Commerce Act, and written there in advance of carriage and of payment."

It is elementary that a decision of a state court *construing* a state statute raises no Federal question. *Lloyd* v. *Matthews,* 155 U. S. 222, 15 S. Ct. 70, 39 L. Ed. 128.

But even if a Federal question were involved, yet the record discloses that it was never raised in the trial court. The notice of special defense makes no reference whatever to any previous order of the Illinois Commission. No propositions of law with reference to the question were presented to the trial court. There is absolutely nothing in the record to show that the attention of the trial court was directed to the question of whether or not the petitioner's rights under either the Commerce Clause or the Fourteenth Amendment were violated by reason of any previous order of the Illinois Commission.

3. Under Point III. of its brief (Pages 43-44), petitioner claims that its property has been taken without due process in violation of the Fourteenth Amendment, because the order of the Illinois Commission granting reparation is alleged to be unsupported by the evidence.

It is clear that such claim was never presented to the trial court. The notice of special defense says nothing whatever about the insufficiency of the evidence before the Illinois Commission.

The motion by the petitioner at the close of the evidence to find the issues for the defendant and the motion in arrest of judgment specify no grounds whatever for such motions, and therefore were insufficient to present petitioner's claim of a violation of its rights under the Fourteenth Amendment.

Petitioner in its brief (Page 33) cites *Consolidated Coal Co.* v. *Illinois*, 185 U. S. 203; 22 S. Ct. 616, 46 L. Ed. 872, as supporting the proposition that "a motion in arrest of judgment may raise a Federal constitutional question." Petitioner has evidently overlooked the fact that in the motion in arrest of judgment made in that case "the invalidity of the statute was specially set up upon the ground of its repugnancy to the Fourteenth Amendment to the Constitution." (185 U. S. 206)

Petitioner having failed to claim in the trial court a violation of its rights under the Fourteenth Amendment because of the alleged insufficiency of the evidence, the Illinois Supreme Court was correct in refusing to review such question, and this Court is, therefore, without jurisdiction to review it.

4. Under Point IV of petitioner's brief (Pages 45-48), it is contended that the petitioner has been deprived of its property without due process of law by reason of the language in the opinion of the Appellate Court construing Section 68 of the Illinois Public Utilities Act (Cahill Ill. Rev. Stat., 1931, Chapter 111(a), Section 87; Smith-Hurd Ill. Rev. Stat., Chapter 111⅔, Section 72). While the Appellate Court interpreted Sec. 68 as depriving the petitioner of the right to litigate the question of the reasonableness of the rates involved because of petitioner's failure to appeal from the first order entered by the Illinois Commission finding the assailed rates unreasonable and prejudicial (R. 319), this interpretation is a mere *obiter dictum*, inasmuch as the Appellate Court did in fact examine the evidence and decide the case upon the merits, saying (R. 319):

> "Nevertheless we have examined the evidence and think it sufficient to sustain the findings, and we have

examined the findings and hold the same sufficient to justify the order for reparation."

The detailed and careful analysis in the opinion (R. 310-315) of all material facts contained in the record is further and convincing evidence that the Appellate Court considered and decided the case on its merits.

Petitioner was, therefore, not denied a hearing before the Appellate Court on the merits of the case, and the opinion of the Appellate Court did not deprive petitioner of property without due process of law.

This Court will not assume jurisdiction of a case in order to review a mere *dictum* of a State court.

This Court said in *Rutland Railroad Company* v. *Central Vermont Railroad Company,* 159 U. S. 630, 16 S. Ct. 113, 40 L. Ed. 284 (U. S., Page 640):

> "It is well settled, by a long series of decisions of this court, that where the highest court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground not involved in a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question."

It is, of course, quite evident that the petitioner was accorded a trial upon the merits by the *trial* court, inasmuch as the trial court received and considered all the evidence offered by the petitioner.

ARGUMENT.

I.

The petition for certiorari filed herein should be dismissed for failure to comply with the rules of this Court.

Rule 38 of this Court as amended June 4, 1934, requires that a petition for certiorari "shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed."

Petitioner has not filed any transcript of the record in this case. It has filed only a copy of the *abstract* of the record which was filed in the Supreme Court of Illinois. An abstract, needless to say, is not a transcript, but is a very abbreviated portion of the transcript.

It is of great importance in this case that the entire record be before the Court and that it should include the proceedings in the State, Supreme and Appellate courts. In our argument under "Jurisdiction" we pointed out that some of the Federal questions which petitioner contends are presented for review by this Court were not only not presented to the trial court, but were not saved for review by the Supreme Court of Illinois because not argued in the briefs. The burden being upon the petitioner to show that this Court has jurisdiction, it was petitioner's duty to include in the record and proceedings in the State courts the briefs filed by petitioner in those courts so that this Court might determine whether or not it had jurisdiction. We, therefore, respectfully submit that this Court

should dismiss the petition filed herein for failure to comply with the above rules of Court.

II.

This case has no widespread or public interest.

The litigation in the case at bar has arisen out of a situation created by the period of Federal control during the World War. That situation has long since passed and it is extremely unlikely that any further litigation therefrom will ever occur. The Illinois Supreme Court and the Illinois Appellate Court apparently considered the case of insufficient importance to warrant publication of their respective opinions. We respectfully submit that under these circumstances the time and energy of this Court should not be expended in reviewing the case.

III.

The Illinois Commerce Commission was not precluded from granting reparation by any previous order of the Interstate Commerce Commission.

The first question which petitioner contends is presented by the case (Petition, Pages 2, 23; Brief, Page 37) is whether a State Commission has power to grant reparation for the exaction of rates which were previously fixed by the Interstate Commerce Commission. This question is neither new nor novel and has been many times decided by this Court, commencing with the *Shreveport* case (*Houston East & West Texas Railroad Co.* v. *United States*, 234 U. S. 342; 34 S. Ct. 833; 68 L. Ed. 1341).

The difficulty with petitioner's contention, however, is that the *facts* in this case do not bring it within the doctrine announced by the *Shreveport* case since the Interstate Commerce Commission did not fix the rates in question. The order of the Interstate Commerce Commission in *Ex Parte* 74 and in Docket 11703 merely established a general level of rates throughout the United States and throughout the State of Illinois, respectively. No *specific* rates were fixed. This was definitely decided in *Brimstone R. R. & Canal Co.* v. *United States of America*, 276 U. S. 104; 48 S. Ct. 282; 72 L. Ed. 487, and *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 Fed. (2d) 443, certiorari denied 284 U. S. 675; 52 S. Ct. 130; 76 L. Ed. 571. No specific rates on brick from Bernice, Illinois, having been previously fixed by the Interstate Commerce Commission, the award of reparation by the Illinois Commission in no way conflicted with the power of the Interstate Commerce Commission, and the doctrine of the *Shreveport* case has no application. The right of a State Commission to fix intrastate rates or grant reparation thereon in the absence of any previous decision of the Interstate Commerce Commission cannot be questioned.

IV.

The Illinois Commerce Commission was not precluded from granting reparation by any previous order of its own.

It is further contended (Petition, Page 23; Brief, Page 41) that the question is presented whether the petitioner was deprived of property without due process by reason of the alleged fact that the Illinois Commerce Commission awarded reparation on rates which were previously authorized by the *Illinois* Commission.

The answer to that contention is twofold: First, the Illinois Commission did not in fact authorize the rates in question. The only order entered by it on which petitioner bases this contention was the order in Docket 10620 (R. 210-217). This order followed the order of the *Interstate* Commerce Commission in *Ex Parte* 74, and merely prescribed a general advance in Illinois *state* rates commensurate with the general advance in *interstate* rates authorized by the Interstate Commerce Commission in *Ex Parte* 74. Since the Interstate Commerce Commission was not precluded by *Ex Parte* 74 from awarding reparation, *Brimstone R. R. & Canal Co.* v. *United States of America,* 276 U. S. 104; 48 S. Ct. 282; 72 L. Ed. 487, and *Eagle Cotton Oil Co.* v. *Southern Ry. Co.,* 51 Fed. (2d) 443, certiorari denied 284 U. S. 675; 52 S. Ct. 130; 76 L. Ed. 571, it necessarily follows that the order of the Illinois Commission in Docket 10620 did not preclude the Illinois Commission from granting reparation in the case *sub judice.*

Secondly, as we have already indicated, this Court has held that even if the Commission had previously authorized the particular rate upon which it later granted reparation, the question of its power to grant such reparation would not involve any constitutional question but merely a construction of the statute, *Great Northern Ry. Co.* v. *Sunburst Oil Refining Co.,* 287 U. S. 358; 53 S. Ct. 145; 77 L. Ed. 360, and this Court has no jurisdiction to review the decision of the State court construing the Illinois Public Utilities Act.

V.

The award of reparation was amply supported by evidence before the Illinois Commerce Commission.

The third reason relied upon by petitioner for review (Petition, Page 24; Brief, Page 43) is its contention that the award of reparation is not supported by the evidence and that the rate upon which reparation was granted is confiscatory; therefore, it is contended that the petitioner was deprived of property without due process of law.

There was a very extended hearing before the Illinois Commerce Commission and a great deal of testimony taken. The cost figures which "are at best only rough approximations", *American Fruit Growers Inc. of California, et al.* v. *Southern Pacific R. R. Co.*, 134 I. C. C. 639, contained many disputed items, as the Illinois Commission stated in its order (R. 47). After carefully considering all evidence before it, including the cost study, the Illinois Commission found that fifty cents per ton "provided adequate revenue for the transportation of brick from Bernice, Illinois" (R. 48).

That this finding of the Commission was justified and that petitioner's cry of "confiscation" is, to say the least, insincere, is confirmed by the fact that the fifty cent rate had previously been *voluntarily* put into effect by the petitioner itself. The order of the Interstate Commerce Commission in Docket 11317 (R. 125) merely required petitioner to remove the discrimination between the rates from points outside the district and rates within the district itself as applied to interstate movements. Petitioner under this order could have raised the rates within the district on interstate movements. Instead it voluntarily reduced the rates from Bernice to fifty cents per ton on interstate movements and then also voluntarily reduced the *intra*-state rate

from Bernice to fifty cents per ton. It is very difficult to believe that the petitioner would voluntarily "confiscate" its own property.

VI.

The construction in the Appellate Court opinion of Section 68 of the Illinois Public Utilities Act is a mere dictum.

The fourth reason adduced by petitioner for review in this case (Petition, page 25; Brief, page 45) is that the Appellate Court of Illinois construed Section 68 of the Illinois Public Utilities Act as depriving petitioner of the right to be heard upon the merits of the case. As we have already indicated in our argument on Jurisdiction (page 17, *supra*), the Appellate Court did in fact decide the case on its merits, and therefore this part of the Appellate Court's opinion is mere *obiter dictum*, and neither furnishes ground for jurisdiction nor for the exercise of the discretion of this Court (if jurisdiction be found) to grant the writ of certiorari.

CONCLUSION.

We respectfully submit that the petition for certiorari should be dismissed for failure to comply with the rules of this Court requiring a certified transcript of the record to be filed with the Court; that this Court has no jurisdiction to review the judgment of the Supreme Court of Illinois and the Appellate Court of Illinois because the Federal questions relied upon were not presented to and passed upon by the trial court, and the Supreme Court of Illinois properly refused to review the same; that the case has no widespread or public interest, and that none of the Federal questions contended for by petitioner is actually presented by the record.

Respectfully submitted,

ABRAHAM R. MILLER,
Counsel for Respondent,
Illinois Brick Company.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

No. 360

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935.

No. 360

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR RESPONDENT.

Preliminary Statement.

The opinion of the Appellate Court for the First District of Illinois, which is here being reviewed, has not been printed.

The statement of facts contained in the petitioner's brief and in the opinion of the Appellate Court, from which petitioner has quoted, is substantially accurate, and respondent, therefore, does not deem it necessary to make any further statement of fact.

ARGUMENT.

I.

The order of the Interstate Commerce Commission in Docket 11703 merely prescribed a general level of intrastate rates and therefore did not deprive the State authorities of their inherent jurisdiction to deal with specific intrastate rates provided that such general level was not thereby violated.

The first question presented by this case is whether the Illinois Commerce Commission was deprived of all jurisdiction to grant reparation based on the unreasonableness and discrimination of a specific intrastate rate, by reason of the fact that the Interstate Commerce Commission, acting under the power conferred upon it by Section 15 (a) of the Interstate Commerce Act, had previously granted the carriers as a whole a general increase in revenue, and thereafter, acting under Section 13 (4) of the same Act, had required the carriers in Illinois to increase the general level of Illinois intrastate rates to conform with the increase on interstate traffic previously ordered.

Prior to the enactment of the Transportation Act of 1920, (41 Stat. at L. 456, Chap. 91), the Interstate Commerce Commission had no jurisdiction over state rates except where such state rates created a prejudice against persons and localities engaged in interstate commerce. (Minnesota Rate Case—*Simpson* v. *Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729.)

The Transportation Act of 1920 by Sec. 422 (Sec. 15a, Interstate Commerce Act), required the Interstate Commerce Commission to establish rates which would permit the carriers as a whole to earn a fair return upon the aggregate value of their property. By Section 416 of that Act (Sec. 13 (4) Interstate Commerce Act) the power of the Interstate Commerce Commission was extended to permit the removal of unjust discrimination by intrastate rates, not only as to persons and localities, but also as to interstate commerce as a whole.

The right of the Interstate Commerce Commission to establish purely intrastate rates under Section 13 (4) must be read in connection with the duty of Congress under Section 15 (a) to prescribe adequate revenues for the railroads.

> *Florida* v. *United States,* 282 U. S. 194, 211; 75 L. Ed. 291, 302; 51 S. Ct. 119.
>
> *United States* v. *Louisiana,* 290 U. S. 70, 75; 78 L. Ed. 181, 185; 54 S. Ct. 28.

The general authority either to prescribe reasonable state rates or to remove discrimination between state rates themselves is at all times lodged with the state authorities. See *Florida* v. *United States,* 282 U. S. 194, 212, 214; 75 L. Ed. 291, 302, 303; 51 S. Ct. 119, where this court said:

> "The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates. *Arkansas R. Commission* v. *Chicago, R. I. & P. R. Co.,* 274 U. S. 597, 71 L. ed. 1224, 47 S. Ct. 724. * * *

"The authority to determine the reasonableness *per se* of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission."

The Interstate Commission has no power (in the absence of any discrimination as to persons and localities) to prescribe minimum intrastate rates unless it first finds that such rates are necessary in order to avoid an undue burden from a revenue standpoint on interstate commerce.

Florida v. *United States,* 282 U. S. 194, 212; 75 L. Ed. 291, 302; 51 S. Ct. 119.

Where the Interstate Commerce Commission has entered an order under Section 13 (4), requiring the general level of state rates to be increased, the state commission is not thereby deprived of its power over specific state rates so long as it does not violate the general level which the Interstate Commerce Commission has prescribed. This Court said in *Railroad Commission of Wisconsin* v. *Chicago, Burlington, & Quincy R. R. Co.,* 257 U. S. 563, 590; 66 L. Ed. 371, 384; 42 S. Ct. 232:

"It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and *must leave appropriate discretion to the state authorities to deal with intrastate rates*

as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." (Italics supplied.)

Of course the Interstate Commission, by virtue of the power conferred upon it by Sections 13 (4) and 15 (a) does not acquire any power to raise intrastate rates above a reasonable level. The Commission is not concerned with the reasonableness *per se* of these rates, but is limited thereby in the extent to which it may raise intrastate rates under that section. It cannot increase specific intrastate rates, even where they are not compensatory, in the absence of discrimination by such state rates against interstate commerce as a whole. In other words, the Interstate Commerce Commission has no power to raise a confiscatory intrastate rate unless it also finds that that rate casts a burden upon interstate commerce from the standpoint of revenue.

Florida v. *United States*, 282 U. S. 194, 212; 75 L. Ed. 291, 302; 51 S. Ct. 119.

Therefore the Illinois Commerce Commission, in our case, after the entry of the order in Docket 11703, did not lose its power to prescribe reasonable intrastate rates or to remove discrimination between purely state rates so long as it did not interfere with the "general level which the Interstate Commerce Commission had found to be fair." The Illinois Commission could therefore have prescribed rates for the future on shipments of common brick from Bernice, Illinois, for purely intrastate movement at any level which the Illinois Commission found reasonable. The sole limitation upon that power was that such rates should not reduce the general level of Illinois state rates which the Interstate Commerce Commission had found to be fair.

If any carrier felt that such reduction in the specific state rate would result in so reducing the general level of state rates, it could immediately resort to court proceedings to enjoin the enforcement of such lower rate. (*Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co., supra.*)

Petitioner cites *Georgia Public Service Commission* v. *United States,* 283 U. S. 765, 772; 75 L. Ed. 1397, 1404; 51 S. Ct. 619, as authority for the proposition that it is necessary in such case to apply first to the Interstate Commerce Commission, requesting it to suspend the operation of the intrastate rate order. This case is no authority whatever for such proposition. It merely holds that where the order of the Interstate Commission is so vague that it is impossible to determine the manner in which it shall be applied to a specific rate, then application should be made to the Interstate Commission to clarify that order.

While it is not clear from the decision in the *Wisconsin Passenger Rate* Case whether the attempted interference by the Wisconsin Commission was directed against all the state passenger rates or only a portion thereof, no distinction in principle is involved. In either case the only question is whether the action of the state commission (whether it attempts to interfere with all the state rates, 50 per cent thereof, or only one rate) results in a reduction of the general level of the state rates "previously found to be fair" by the Interstate Commission. That question can be determined by the proper court.

To hold otherwise would result, in a situation like ours, in depriving the state authorities of all power over purely intrastate rates, even as to a particular rate which in fact did not prejudice interstate commerce. The mere possibility of such interference with interstate commerce would

under such a doctrine be sufficient to deprive the state authorities of all power over intrastate traffic.

Petitioner, in order to avoid being forced into such an indefensible position, virtually concedes that the state commission has the power to reduce prospectively a specific state rate, but contends that a different rule should be applied where the state commission seeks to grant reparation.

In reply to such contention, it must be first observed that the Interstate Commerce Commission would have no power to grant reparation in a situation of this kind because Section 13 (4) gives it power only to prescribe rates for the future.

Atlantic Coast Line R. R. Co. v. *Florida,* 295 U. S. 301, 311; 79 L. Ed. 1451, 1458; 55 S. Ct. 713.

In other words, if, after the order of the Interstate Commerce Commission in Docket 11703, a proceeding had been instituted before the Interstate Commerce Commission, attacking the reasonableness of the brick rate from Bernice and seeking reparation, the Interstate Commerce Commission might have found such rate unreasonable and ordered its reduction for the future, but could not have granted reparation.

To adopt the contention of petitioner that the state commission also has no power to grant reparation in such case, would mean that the shipper would be without remedy although he has been compelled to pay a rate which has not been specifically found reasonable before its exaction, which he had no opportunity to prove unreasonable before its exaction, and which is ultimately found unreasonable.

Secondly, as we have already argued, the state commission has power to reduce prospectively a specific state

rate which it finds unreasonable, provided only that such reduction does not result in a reduction in the general level of the state rates previously found by the Interstate Commission to be fair. It seems clear that the power to prescribe rates for the future must also include the power to grant reparation or damages for the past exaction of unreasonable rates unless it is limited by the statute which has created the commission. There is no such limitation in the Illinois Public Utilities Act. That Act very clearly gives the Illinois Commission such power. (Ill. State Bar Stats. 1935, Ch. 111a, Sec. 72, ¶91.)

While Section 13 (4) of the Interstate Commerce Act limits the right of the Interstate Commerce Commission to grant reparation in such case, it does not in express terms limit the power of the state authorities in that respect.

It is respectfully submitted, therefore, that no limitation upon the power of the state authorities to grant reparation on purely state traffic can be implied except the limitation implied as to the reduction of rates in the future, namely, that such award of reparation or such prospective reduction in rate shall not result in a reduction of the general level of state rates previously authorized by the Interstate Commerce Commission.

Thirdly, a reparation award may be enforced only by a suit for a judgment upon such award. In such suit, if the carrier believes that the award of reparation by the State Commission constitutes an interference with the order of the Interstate Commission increasing the general level of state rates, it has full opportunity to present such contention as a defense to the entry of a judgment, exactly as the petitioner has done in this case. Of course, it would be necessary for the respondent to make the proper showing by competent evidence.

It is respectfully submitted that this record is entirely barren of any evidence from which this Court can find that the award of reparation by the Illinois Commission materially violated the general level of the state rates prescribed by the Interstate Commerce Commission in Docket 11703. Indeed, it is apparent that the award of reparation in this case involved only a negligible amount of revenue when compared with the total increase of revenue awarded the carriers operating in the State of Illinois. The findings of the Commission in Docket 11703 (Rec. 160) show that the difference between the 35 per cent increase originally granted by the Illinois Commission and the 40 per cent increase decreed in Docket 11703 amounted to approximately $3,000,000 on intrastate shipments. It is therefore apparent that the total increased revenues granted the carriers as a whole on intrastate traffic in Illinois by the 40 per cent increase in the general level of rates amounted to something like $24,000,000. The amount of increased revenue which the carriers were expected to derive from increased interstate rates in Illinois is not shown, but it must have amounted to many millions of dollars in addition to the $24,000,000 to be derived from the intrastate traffic. The award of reparation in this case, amounting to less than $29,000, could not possibly have violated the general level of the increase in revenues thus granted. Even the petitioner makes no contention that it did.

Petitioner suggests that if the State Commission is permitted to grant reparation in any case, the Interstate Commission will be without power to "protect its order against such attacks." The truth is that the Interstate Commerce Commission never protects its orders. No machinery has been set up by the Interstate Commerce Act or any other act whereby the Commission can protect its orders. Such orders can be enforced only by a court of competent juris-

diction, and interference with such orders can be prevented only by such court.

The petitioner further contends that if the state commission is permitted to grant reparation in any particular case, then the state commission, by granting reparation in a large number of other cases involving particular state movements, could "retroactively restore the discrimination against interstate commerce removed by the Interstate Commerce Commission's order." Therefore petitioner contends that the Illinois Commission should have no power whatever to grant reparation in *any* case involving state rates after a general increase under Sec. 13 (4). There are a number of answers to such contention:

1. Although the order in Docket 11703 was entered fifteen years ago, the case at bar is the only recorded instance where the Illinois Commerce Commission sought to grant reparation on a purely intrastate rate increased by that order. Indeed we have been unable to find any recorded instance where any other state commission granted reparation under like circumstances. Certainly no such case has as yet reached *this* Court. It is therefore apparent that petitioner's apprehensions are purely fanciful and not based upon actualities.

2. To give effect to petitioner's contention would require this Court to assume that the Illinois Commerce Commission would wilfully and deliberately enter upon a course of conduct designed to thwart the enforcement of the Interstate Commerce Commission's order, and also that the courts of Illinois would lend their assistance to such scheme by entering judgment upon such awards.

3. If a state commission should deliberately embark upon such a scheme, the courts would be fully competent

to deal with the situation by injunctive relief. At any rate, the carrier would always be in a position to defend each particular suit based on a reparation award.

4. The mere possibility that the state commission might abuse its power is no argument against the existence of the power. This Court does not confer any powers upon the state authorities. This Court said in *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466, at page 471:

> "Regulation by a state of intrastate rates is not a function exercised by permission of the Federal government (*Re Rahrer,* 140 U. S. 545, 564; 35 L. ed. 572, 577; 11 Sup. Ct. Rep. 865), or because of its inaction."

The possibility of abuse might be used as an argument against conferring the power in the first instance, but it cannot be considered by this Court in determining whether the power exists.

To summarize our argument: The Interstate Commerce Commission has power under Sections 13 (4) and 15 (a) of the Interstate Commerce Act to order a general increase in intrastate rates when such increase is necessary in order to eliminate a burden on interstate commerce as a whole. In making such an order the Interstate Commerce Commission does not determine that every specific rate involved in the state structure must be maintained at the figure to which such rate is raised as a result of a general increase. It determines merely that it is necessary that a certain general level of state rates must be maintained in order that the carriers as a whole may secure the additional revenue which the Commission has found they are entitled to under Section 15 (a). Consequently, when a state commission thereafter reduces a specific state rate there is no violation of the order of the Interstate Commerce Commission unless such reduction substantially reduces the

general level of revenue granted to the carriers by the Interstate Commission.

No distinction can be drawn in principle between a prospective reduction by state authorities of a specific state rate and a reduction by way of reparations. In both cases the state authorities are acting in the exercise of their inherent power over intrastate commerce. In both cases their action is limited to reductions which do not affect the general level of revenues decreed by the Interstate Commission. In both cases the carrier whose rate is reduced can have his day in court. In the case of a prospective reduction he may test the validity of the reduction by a bill to enjoin the state authorities from putting the rate into effect. In the case of a reparation award, the carrier may urge in the shipper's suit for a judgment on the award exactly the same grounds as a defense to that suit.

The ultimate question which this Court is called upon to decide is this: How far can the Federal power over purely intrastate traffic be extended under the claim that it is necessary to protect interstate traffic.

In the *Shreveport* case this Court stated that the Federal power over intrastate traffic extends only to "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security" and efficiency of that traffic. In *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 651, this Court has held that the power can be extended only to matters which have a "direct effect" upon interstate commerce. It is obvious that in the case at bar the award of reparation on an isolated intrastate movement did not have such a close, substantial or direct effect upon interstate traffic as a whole.

It is submitted the award of reparation in this case was within the power of the Illinois Commission, since the general level of revenue granted the carriers by Docket 11703 was not thereby substantially reduced.

II.

The order of the Illinois Commerce Commission in Docket 10620 did not deprive it of any power thereafter to award reparation upon any specific rate which it found unreasonable because that order merely prescribed an increase in the general level of intrastate rates and did not approve any specific rate.

Petitioner's argument under its Point II is so confusing to us that we consider it necessary to attempt to analyse and restate it as we understand it, in order that our reply may be clear.

Petitioner apparently contends that the Illinois Commission could not grant reparation below the level of the rates of 93½ cents and 94½ cents because, petitioner asserts, those rates were authorized by it and therefore were in effect Commission made rates. Petitioner relies upon *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370; 76 L. Ed. 348; 52 S. Ct. 183.

Petitioner then asserts that *Great Northern Ry. Co.* v. *Sunburst Oil Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145, is not inconsistent with this position because it merely holds that where the rates are Commission made reparation may be granted if at the time the rates are made notice is given that the rates are provisional. Petitioner contends that neither the statutes of Illinois nor any decisions of the Supreme Court of Illinois nor any

order of the Illinois Commission, prior to the exaction of the rates in question, gave any notice that rates authorized by the State Commission would be provisional.

Petitioner's final contention is that even if it be assumed that notice was given by the order of the Illinois Commission in Docket 10620, that notice was limited to the possibility of a reduction from the 93½ cent and 94½ cent rates to the 70 cent rate which had been increased pursuant to the order in Docket 10620.

Petitioner further contends that no notice was given as to the provisional character of the 70 cent rate, because such rate was originally prescribed by the Director General of Railroads and was continued in force after the termination of Federal Control by Section 208 (a) of the Transportation Act of 1920. These contentions may be briefly answered as follows:

Arizona Grocery Company v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370; 76 L. Ed. 348; 52 S. Ct. 183, held that "where the (Interstate) Commerce Commission has upon complaint and after hearing" declared the maximum reasonable rate to be charged upon a specific commodity, it may not thereafter grant reparation for the exaction by the carrier of such rate.

In *Eagle Cotton Oil Co.* v. *Southern Ry. Co.* (C. C. A. 5th), 51 Fed. (2nd) 443, it was held that the Interstate Commerce Commission *could* grant reparation where the rates in question had not been specifically approved by the Interstate Commerce Commission but were merely the result of the general increase granted under *Ex Parte 74*. This court denied certiorari in the *Eagle Cotton Oil* case during the same term in which it decided the *Arizona Grocery* case, 284 U. S. 675, 76 L. Ed. 571, 52 S. Ct. 130. To the same effect is *Texas and P. Ry. Co.* v. *Louisiana Oil*

Refining Corp. (C. C. A. 5th), 76 Fed. (2nd) 465, certiorari denied, 295 U. S. 767, 79 L. Ed. 1708; 55 S. Ct. 926.

The decision in the *Eagle Cotton Oil* case is predicated upon *Brimstone R. & Canal Co.* v. *United States*, 276 U. S. 104, 122, 48 S. Ct. 282, 287, 72 L. Ed. 487, where this court said:

> "The general findings and permission of *Ex parte 74* and Re Reduced Rates did not approve or fix any particular rate. * * * In them the Commission was dealing with the whole body of rates throughout the country—were looking at the general level of all rates and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration."

These decisions are quite consistent. The general principle to be deduced from them is that the Interstate Commerce Commission may not grant reparation for the exaction of a rate which it has previously specifically approved after a complaint and full hearing upon that specific rate, but inasmuch as interstate rates, until such a full hearing, are carrier made and not Commission made, reparation may be granted by the Interstate Commission where the only approval of the rate is a general advance granted under a proceeding like *Ex parte 74*.

Assuming that the Illinois Public Utilities Act is similar to the Interstate Commerce Act (as we shall demonstrate later) the doctrine of the *Eagle Cotton Oil* case and not the *Arizona Grocery* case, would apply because the Illinois Commission never at any time specifically approved the rates here under attack. The rates of 93½ cents and 94½ cents were instituted by the carriers following the decision of the Illinois Commission in its Case

Number 10620. (7 Ill. Pub. Ut. Com. Rep., 1047; Rec. 146-152). The order in that case was entered after *Ex Parte 74* and was intended to accomplish for intrastate rates exactly the same thing as was accomplished by *Ex Parte 74* for interstate rates, namely, permission to the carriers operating in Illinois to put into effect an increase in the general level of all intrastate rates in Illinois. The terms of the order were permissive, just as the terms of the order in *Ex Parte 74*. The order read in part "that all other freight rates * * * *may* be increased 33⅓ per cent". (Rec. 151).

Even if the Illinois Statute provided for Commission-made rates, no Federal or constitutional question would be involved. The question would involve only the interpretation of the Illinois statute. (*Great Northern Ry. Co.* v. *Sunburst Oil & Refining Company*, 287 U. S. 358, 362.)

Petitioner, however, attempts to inject a Federal question by contending that *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Company, supra*, requires notice to be given before the collection of rates made by a state Commission that such rates are merely provisional, and that in the absence of such notice, the granting of reparation would deny the carrier due process.

Under the Illinois Public Utilities Act the rates are in the first instance carrier made and not Commission made. The method prescribed for instituting rates in Illinois follows the Interstate Commerce Act in essential particulars and is entirely different from the public utilities acts of the various states involved in the cases cited in the footnote to page 33 of petitioner's brief.

Sections 33 to 36 of the Illinois Public Utilities Act (Ill. State Bar Stats. 1935, Ch. 111a, paragraphs 48 to 51) provide that a public utility shall file schedules with the State

Commission showing rates which it proposes to put in force. Any existing rate may be changed by the public utility by filing with the Commission a new schedule containing such change which becomes effective after 30 days notice. The State Commission, like the Interstate Commission, may either upon complaint or upon its own initiative suspend the new rate until it has investigated the same. But unless the Commission does investigate the new rate it becomes effective after 30 days. If upon such investigation the Commission finds the new rate unreasonable it may reject it and prescribe a reasonable rate.

Section 72 of this Act, under which suit was brought in the case at bar, provides as follows:

> ¶ 91. *Reparation for overcharge—Recovery in civil action—Damages—Complaints for recovery—Inquiry into claims against public utilities.*) §72. When complaint has been made to the commission concerning any rate or other charge of any public utility and the commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

Since the Illinois statute permits the rates to be instituted by the carriers in the first instance and to be modified or rejected by the Commission, after hearing, and to grant reparation if it finds such rates was either excessive or discriminatory, it thereby expressly gives notice that rates instituted by the carriers are provisional.

Petitioner's contention that other notice was necessary can have no meaning except in so far as the Illinois Com-

mission should attempt to grant reparation upon rates which it has, after full hearing, specifically found reasonable and prescribed for the future, as in the *Arizona Grocery* case. But we have already seen that the Illinois Commission never prescribed the rates in question. Therefore the rule of the *Eagle Cotton Oil* case applies and no notice other than the Illinois statute itself was necessary.

There is nothing in the decision in *Great Northern Ry. Co.* v. *Sunburst Oil Refining Co.*, 287 U. S. 358, 77 L. ed. 360, 53 S. Ct. 145, inconsistent with our contention. In that case it appeared that under the Montana statute state rates were in the first instance Commission made. (See *Montana Products Co.* v. *The Great Northern Ry. Co.*, 91 Mont. 194, 7 Pac. (2d) 919, 923.) This court held that even where the rate is Commission made, it may be provisional and subject to reparation. The only requirement imposed by the Fourteenth Amendment is that notice be given of the provisional character of such Commission made rates. Such notice may be given by the statute itself or by judicial interpretation. This Court then found that the decision of the Supreme Court of Montana in the *Doney* case, although afterwards overruled for the future, was still sufficient notice until overruled that the rates instituted by the Commission were provisional and therefore reparation might be granted, without violating the Fourteenth Amendment.

The fact that the rate in question was originally established by the Director General of Railroads did not limit the Illinois Commission in the exercise of its power to grant reparation for a period subsequent to the termination of Federal control.

It is also contended that, conceding that the Illinois Commission could award reparation to the extent by which the rates had been raised under Docket

10620, namely, from 70 cents to 93½ cents and 94½ cents per ton, it could not grant reparation below 70 cents because that rate had originally been put into effect by the Director General of Railroads under General Order Number 28 and was still in force on September 1, 1920, at the termination of the period of Federal control. Section 208 (a) of the Transportation Act of 1920 provided that all rates, fares and charges in effect on February 29, 1920, 'should continue in force and effect until thereafter changed by State authority or Federal authority, respectively, or pursuant to authority of law". It is therefore contended that the 70 cent rate was a valid rate, binding upon carriers and shippers until the state authorities, by affirmative action, changed it, and that no reparation could be granted below the level of that rate because nowhere was any notice given that such rate was provisional.

The first answer to this contention is that the 70 cent rate was not a Commission made rate. The fact that the Director General initiated such rate does not make it Commission made. The Director General was merely acting in place of the carriers. As was said in *Missouri Pacific Railroad Co.* v. *Boone*, 270 U. S. 466, 469; 70 L. Ed. 688, 691; 46 S. Ct. 341:

> "The existing right of the *carriers* to initiate rates was transferred by the second paragraph of Section 10 of the Federal Control Act to the Director General. * * *" (italics supplied).

The last paragraph of Section 10 of the Federal Control Act of March 21, 1918, Fed. Stat. Ann., Supp. 1918, p. 763, gave the Interstate Commerce Commission full authority to investigate any rates instituted by the Director General just the same as it previously had power to investigate rates instituted by carriers, and to enter any

order which the Interstate Commission might have entered before the period of federal control,—in other words, to grant reparation if any particular rate instituted by the Director General was found unreasonable. It is clear, therefore, that during the period of federal control the rates fixed by the Director General were not Commission made rates.

That these rates were carrier made is still further borne out by the provisions of the Transportation Act of 1920. Section 206 (c) and Section 208 (a) of that Act permitted the Interstate Commerce Commission either to grant reparation or reduce a rate even during the six months' guaranty period subsequent to February 29, 1920.

It is difficult to understand, therefore, how a rate which was not Commission made prior to the expiration of the guaranty period on August 31, 1920 became Commission made after that date when control of the rate was returned to the state authorities. Petitioner suggests that it became Commission made after that period because Section 208 (a) of the Transportation Act of 1920 provided that the rate should continue in force until thereafter changed by state authority. The real purpose and meaning of this provision is set forth in *Missouri Pacific R. R. Co.* v. *Boone, supra,* wherein this court held that that provision contained no prohibitions but merely explained which tariff should be deemed operative. It did not intend to conserve any revenues for the carriers and "there was no purpose in Congress to maintain in force, after the expiration of the six months' guaranty period, either the interstate or the intrastate rates which had been established by the Director General." (U. S. p. 474, L. ed., p. 693.)

In so far as petitioner contends that no reparation could be granted because the carriers had no notice that the 70-cent rate was provisional, the answers are:

First, the Federal Control Act of March 21, 1918 by permitting the Interstate Commerce Commission to investigate rates initiated by the Director General and to grant reparation gave sufficient notice that such rates were provisional;

Secondly, the Transportation Act of 1920, by giving the Interstate Commerce Commission power to grant reparation upon any rates initiated by the Director General which it found unreasonable even during the six months' guaranty period, gave notice that such rates were provisional; and

Thirdly, the interpretation placed by this Court on Section 208 (a) means that that Section also gave notice that the rates were provisional and that the state authorities would have the right to deal with them as provisional when the control of intrastate traffic was returned to them.

III.

The judgment of the court below did not deprive petitioner of due process of law.

Petitioner under Point III of its brief contends that it has been deprived of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States because, (1) the Appellate Court of Illinois refused to review the evidence in the case, and (2) regardless of whether that court reviewed the evidence, there was a total absence of competent evidence to sustain the award of reparation.

A. *The Appellate Court of Illinois In Fact Reviewed the Evidence. Therefore Its Construction of Section 68 of the Illinois Public Utilities Act being unnecessary to its decision will not be reviewed by this Court.*

The answer to the first branch of petitioner's contention is that the Appellate Court, notwithstanding the opinion expressed by it that, under a proper construction of Section 68 of the Illinois Public Utilities Act, petitioner, by failing to appeal, had lost its right to contest on the merits the order of the Illinois Commission granting reparations, in fact *did review* the evidence. The opinion of the Appellate Court conclusively establishes this, for the court in that opinion said (Rec. 231):

> "Nevertheless, we have examined the evidence and think it sufficient to sustain the findings, and we have examined the findings and hold the same sufficient to justify the order for reparation."

Not only did the Appellate Court review the evidence, but the detailed and careful analysis of facts and evidence found in the court's opinion (Rec. 222-227) indicates a most careful and conscientious consideration of the case on its merits. So well did the Appellate Court consider the facts, that Petitioner has used the opinion of that court as its own statement of the facts in its brief. Clearly petitioner was not deprived of due process by any failure on the part of the Illinois court to review the evidence.

This court has held many times that it will not review a Federal question unless the decision of the state court upon that question was necessary to the determination of the cause and that the judgment as rendered could not have been given without deciding it. See *Brown* v. *Atwell*, 92 U. S. 327, 23 L. Ed. 511; *First National Bank* v. *Esther-*

ville, 215 U. S. 341, 54 L. Ed. 223, 30 S. Ct. 152. Inasmuch as the Appellate Court reviewed the evidence it was not necessary for it to consider the construction of Section 68 of the Public Utilities Act and therefore this court will not review any federal question based upon that construction.

B. *The Petitioner was not Denied Due Process of Law by Lack of Evidence to Sustain the Award of Reparation.*

The second branch of petitioner's contention that it has been deprived of its rights under the Fourteenth Amendment to the Federal Constitution is based upon the alleged insufficiency of the evidence before the Illinois Commission to sustain the reparation award.

(1) Petitioner's failure to raise this question in the Trial Court prevents it from raising it here.

Petitioner cannot urge in this Court that it has been deprived of property without due process under the Federal Constitution because of a lack of evidence to support the award of reparation, for the reason that petitioner failed to set up or claim this defense, in the trial court.

Petitioner filed four pleas in the state court (Rec. 11-13); first, non-assumpsit; second, not guilty, third, *nil debit;* and fourth, a notice of special defenses.

In none of these pleas is any mention made of an absence of evidence to support the award of the Illinois Commission. No claim is made of any deprivation of property without due process or any violation of the Fourteenth Amendment to the Federal Constitution. The contention now urged by petitioner is not to be found in any pleading in this case.

The rule of law as to the necessity of properly raising a constitutional question in the state court in order that

such question may be reviewed by this Court is well settled. In *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 20 S. Ct. 205, 44 L. Ed. 299, the Supreme Court of Illinois had rendered a judgment sustaining a tax on tangible property and also a capital stock tax levied upon the plaintiff in error which maintained an inter-state bridge across the Mississippi River. Plaintiff in error had filed objections to the tax on tangible property both on the ground that it constituted a violation of its rights under the Fourteenth Amendment to the Federal Constitution and that it was an interference with interstate commerce. As to the capital stock tax, the objections of plaintiff in error covered only the ground of interference with interstate commerce, and no objection was made based on a violation of its rights under the Fourteenth Amendment. This Court held that no objection to the capital stock tax on the ground of its violation of the Fourteenth Amendment could be urged in this Court because that objection had not been raised in the state court, saying (U. S. p. 633; L. Ed. p. 302):

> "4. As to the objection that the entire capital stock was assessed by the state board of equalization, it is enough to say that the question that the action of that board was in violation of the Constitution of the United States, except so far as it was claimed to be an interference with interstate commerce, was not raised.
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> "In *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379, it was held that where a Federal question is raised in the state courts, the party who resorts to this court cannot raise another Federal question, not connected with it, which was not raised in any of the courts below.

"To justify our taking jurisdiction, the Federal question must be specially set up or claimed in the state court; the party must have the intent to invoke for the protection of his rights the Constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709. * * *"

In *Erie Railroad* v. *Purdy*, 185 U. S. 148, 22 S. Ct. 605, 46 L. Ed. 847, in an action brought in the Supreme Court of New York against a carrier to recover penalties under the Mileage Book Act, the answers filed by the defendant in the trial court set forth that the statute relied upon in the declaration was unconstitutional and void because it constituted a violation of the commerce clause of the Federal Constitution and "also because it is in violation of various other provisions of the Constitution of the United States and of the Constitution of the State of New York." At the close of the evidence the defendant renewed its motion to dismiss the complaint, but the sole ground on which it assailed the validity of the statute was that it constituted an interference with the regulation of interstate commerce.

This court held that the defendant had sufficiently raised in the trial court the question of the alleged violation of the commerce clause of the Federal Constitution, but had not sufficiently raised the question of the violation of the Fourteenth Amendment, notwithstanding that a general reference had been made by the defendant in its answer to an alleged violation of "various other provisions of the Constitution of the United States", saying (U. S. p. 153; L. Ed. p. 850):

"In the present case the statute was not drawn in question in the trial court as invalid under any clause

of the Constitution except the one relating to commerce. It was not even asserted there to be invalid under 'various other provisions' of that instrument. The statements in the motion for nonsuit, that 'the cause of action alleged in such action has not been proved', and that 'no cause of action has been proved in either of the actions consolidated in the action on trial,' were too vague and general to indicate that the defendant claimed anything under that Amendment. The record before us is consistent with the idea that the defendant did not claim, in the trial court, in any form, generally or specially, that the statute deprived it of its property without due process of law, or denied to it the equal protection of the laws. * * *"

In its present brief petitioner fails to discuss this question, but in its petition for certiorari, it rested its contention that this federal question was sufficiently raised in the state court solely upon its motion to find the issues for the defendant (petitioner) at the close of all the evidence and its motion in arrest of judgment. An examination of these motions (Rec. 189-191) will show that both motions were merely formal ones. Not only did they fail to make mention of the Fourteenth Amendment or of any deprivation of property without due process, but they specified no grounds of any character.

In *Erie Railroad* v. *Purdy*, 185 U. S. 148, 22 S. Ct. 605, 46 L. Ed. 847, *supra*, this Court expressly held that a motion for a nonsuit does not indicate that the petitioner claims anything under the Fourteenth Amendment unless that motion specifically states as a ground therefor that petitioner has been deprived of property without due process.

Petitioner in its petition for certiorari relied upon *Consolidated Coal Co.* v. *Illinois,* 185 U. S. 203, 46 L. Ed. 872, 22 S. Ct. 616. That case is of no assistance to the petitioner but rather it supports the contention of respondent, for it is stated in that case that there was a motion made in arrest of judgment "in which the invalidity of the statute was specially set up upon the ground of its repugnancy to the 14th Amendment to the Constitution" (U. S. p. 206; L. Ed. p. 875).

(2) There was no lack of substantive evidence before the Illinois Commission to support its award of reparation.

Petitioner contends that there was no substantive evidence before the Commission to support its award of reparation and that therefore petitioner was deprived of property without due process, citing *Northern Pacific Ry. Co.* v. *North Dakota, ex rel McCue,* 236 U. S. 585; 59 L. Ed. 735; 35 S. Ct. 429. Petitioner concedes that this Court will not weigh the evidence before the Commission but will examine the record to determine only whether there is any substantive evidence to support the Commission's findings. This doctrine has been many times confirmed by this court. See the latest expression in *Atlanta, Birmingham & Coast R. R. Co.* v. *United States,* ..... U. S. .....; 80 L. Ed. (Adv.) 25; 56 S. Ct. 12.

The evidence taken by the Commission covered 130 typewritten pages and included 17 exhibits, some of which were very voluminous, and showed the following facts:

1. For a long period of time, namely, from August, 1911 to June 24, 1918, the rates on common brick from Bernice, Illinois, to points within the Chicago Switching District were the same as the rates on common brick between points

wholly within the Chicago Switching District, 25 cents per ton (Rec. 41; Ex. 5; Rec. 69). The fact that this rate was voluntarily maintained by the carriers for such a long time would be persuasive, if not conclusive, evidence that a sudden increase to 98 cents, or almost 300 per cent, while the rate within the District was contemporaneously increased to only 40 cents, would make the 98 cent rate unreasonable.

2. During this long period of time the one line carload rate on general commodities and the two-line rate on common brick between points wholly within the Chicago Switching District was 30 cents per ton, only 5 cents per ton *more* than the one-line brick rate from Bernice and within the District (R. 44).

3. Because of the errors of the Director General first, in applying a 40 cents per hundred pound flat increase on common brick at the same time a 25 per cent increase was applied to general commodities within the Switching District, and secondly, in withdrawing such 40 cents per ton increase on movements of brick within the Switching District, but leaving it in effect as to Bernice, the one-line rate on common brick from Bernice became 70 cents as against a one-line rate on brick of 30 cents within the District.

4. At the same time that the rate on common brick from Bernice to the Switching District was 70 cents per ton, the rate on general commodities within the District itself was only 40 cents per ton (Rec. 44).

5. The result of the action of the Director General also created another anomalous and wholly unreasonable situation, to wit: the rate on common brick via a two-line haul within the Chicago Switching District became about one-half the contemporaneous one-line brick rate from Bernice, to wit: 40 and 60 cents as compared to 70, 93½, 94½ and 98 cents (Rec. 41). Since the two movements

were in all ways comparable, the one-line rate should of course have been appreciably lower than the two-line rate.

6. The evidence before the Commission also showed the economic and competitive conditions relating to the brick industry within and nearby the Chicago Switching District. This showed that the principal market for common brick from Bernice was the Chicago District and that it would be impossible to operate the plants at Bernice without shipping to the Chicago District, because only 25 per cent of the plants' capacity went to markets outside the District (Rec. 40).

It also showed the numerous plants located within the Chicago Switching District with which the plaintiff's plants at Bernice were in competition (Rec. 40; Rec. 68).

The record also shows that at the time the rates of 93½, 94½ and 98 cents per ton on common brick were in effect from Bernice, there were in effect from Chicago Heights into the Chicago Switching District rates of 42 cents and 50 cents per ton on hollow tile. Chicago Heights is eight or nine miles farther away from the Switching District than Bernice and hollow tile is a strong competitor of common brick (Rec. 45-46).

7. The evidence as to the distances from Bernice to points of destination within the District, as compared to distances between points of origin and destination wholly within the Chicago Switching District, shows that there is no material difference (Exs. 2, 6, 7 and 8; Rec. 67, 70, 71, 72).

8. The cross-examination of the defendant's own witnesses shows that the operating conditions with respect to movements from Bernice were no more difficult than

those respecting movements wholly within the District; in fact, there are movements within the District itself that are more complicated than the movement from Bernice (Rec. 54-6).

9. The rate of 50 cents per ton from Bernice to points of destination within the Chicago Switching District was *voluntarily* put into effect by the carriers, including petitioner, as of February 16, 1922. This fact alone was substantive evidence from which the Illinois Commission might find a 50-cent rate reasonable.

10. Although the decision of the Interstate Commerce Commission in Docket 11317 permitted the carriers to charge 10 cents per ton more on interstate brick shipments from Bernice than on shipments wholly within the District, the carriers, including petitioner, not only reduced the 98 cent rate, but voluntarily restored the parity that had existed prior to June 25, 1918, between rates from Bernice and rates on brick within the District. Furthermore this voluntary reduction resulted in again placing the rate on brick from Bernice below the level of rates on general commodities within the District. These facts constituted substantive evidence that the rates of 93½ cents, 94½ cents and 98 cents, which were considerably higher than the contemporaneous rate on common brick and general commodities within the District, were unreasonable.

In *Virginian R. Co.* v. *United States*, 272 U. S. 658, 666, 71 L. ed. 463, 468, 47 S. Ct. 222, this Court held that evidence that other railroads were voluntarily transporting similar traffic in the same territory under like operating conditions upon lower rates afforded "substantive evidence to support the finding that the existing rates were unreasonable and that those which the order directs are reasonable."

In the case at bar the evidence shows not only that other railroads, but petitioner as well, were voluntarily transporting not only similar commodities but much higher grade commodities in the same territory under like operating conditions at much lower rates. Such evidence under the ruling in the *Virginian Railroad* case would be sufficient in and of itself to sustain the findings of the Illinois Commission and to show that there was no violation of the due process clause.

See also to the same effect *Chicago, M. & St. P. Ry. Co.* v. *Public Utilities Commission of the State of Idaho*, 274 U. S. 344, 350, 71 L. ed. 1085, 1090, 47 S. Ct. 604, wherein this court held that evidence that certain rates were very low "in comparison with rates on other commodities" was sufficient to warrant, if not to require, a finding that they were confiscatory.

In the case at bar the evidence showed the converse, namely, that the rates assailed were very *high* compared to other commodities. Therefore, it follows that this evidence was sufficient to warrant, if not to require, a finding that the rates were unreasonably high.

The only real contention made by petitioner is that since the Illinois Commission referred to the cost study in finding the 50-cent rate reasonable (Rec. 36), then this court can examine only the cost study in order to determine whether or not there was any substantive evidence to support the Commission's findings.

It has been many times held by the Interstate Commerce Commission that cost studies are mere approximations. *American Fruit Growers, Inc., of California, et al.* v. *Southern Pacific R. R. Co.*, 144 I. C. C. 639, 659. Furthermore, in determining the reasonableness of a single rate on one *particular* commodity, a cost study has even less accurate

value. Thus, in *Sugar from Key West,* 112 I. C. C. 347, the Interstate Commerce Commission says (page 348):

> "It is extremely difficult, if not impossible, to ascertain accurately the cost of transporting a particular kind of traffic for a certain distance."

In view of the fact that a cost study is only a rough approximation, the Commission of course not only had the right, but was required, to analyze the various details presented by the cost study, to consider the possibilities of error in such details and the unreliability of the testimony of petitioner's witness, and to draw its own conclusion as to what rate was reasonable. The Illinois Commission was not required to accept at face value the conclusions of petitioner's witness as to the cost of operations.

As an illustration of the unreliability of the testimony adduced by petitioner's witness LaRue, we quote the following cross-examination of that witness appearing on pages 402 and 403 of the record filed in the Appellate Court of Illinois:*

> "Q. You remember testifying in the case before the Interstate Commerce Commission Docket 11317?
>
> "A. I do.
>
> * * *
>
> "Q. Do you remember being asked by Commissioner Mackler this question and making this answer: Then the actual line haul cost as distinguished from the two terminal service would be a very small figure compared with the two terminal service? and

*This has been omitted from the printed transcript of the record prepared by the Clerk of this Court. Respondent had no opportunity to supply in the printed transcript of the record the parts so omitted.

did you answer: Apparently so, yes. And were you asked, Well would it be five per cent? and you said, Possibly.

"Q. Do you remember these questions being asked you?

"A. I don't remember. I couldn't say without refreshing my mind.

"Q. Have you no recollections on this matter?

"A. Not on those particular questions.

"Q. You don't recall answering Examiner Mackler that the road haul cost would be possibly five per cent of the terminal cost?

"A. I don't know, no, sir.

"Q. If you had made such an answer, do you think it would have been correct at that time?

"A. *That was my opinion at that time.*" (Italics supplied.)

Petitioner in effect is asking this Court to overlook the fact that the Commission made findings as to all the other facts which we have enumerated above and that it does not appear from the order of the Commission that its finding that the assailed rates were unreasonable was based only on the cost study. The Commission had the right to consider the cost study in the light of all these other facts, and this it obviously did.

The only question before this court is whether or not there was *any* substantive evidence before the Commission to support its findings and award. It is clear that entirely apart from the cost study there was sufficient sub-

stantive evidence to support the award and therefore petitioner was not deprived of property without due process of law.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

ABRAHAM R. MILLER,
For Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

No. 360

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

Petition for Rehearing on Behalf of Respondent.

ABRAHAM R. MILLER,
Counsel for Respondent.

CHICAGO LAW PRINTING CO., 111 N. WACKER DRIVE (COR. WASHINGTON ST.) TEL. FRANKLIN 6521

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IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

Petition for Rehearing on Behalf of Respondent.

The undersigned, Illinois Brick Company, a corporation, respondent herein, respectfully petitions the Court for a rehearing of the above entitled cause and in support thereof suggests the following grounds:

I.

The Court's decision in part is based upon a *mistake of fact.*

Under Point 2 of the opinion this Court holds that as to transportation in the period between the order of October 27, 1921, and February 16, 1922, the Illinois Commis-

sion had no jurisdiction to grant reparation. In support of that holding the court says in part as follows:

> "But the order of January 11, 1921, established the rule of equality between rates for interstate and intrastate transportation from Bernice into the district and also for transportation between points within the district. On the facts found by the Interstate Commerce Commission and the law as applied by it, petitioner was required to maintain equality between these intrastate and interstate rates."

The court then states that the Interstate Commerce Commission's order of October 27, 1921, apparently intended to continue the equality between interstate and intrastate rates from Bernice and to make both rates subject to the authority of the Interstate Commerce Commission. That part of the court's opinion reads as follows:

> "There is nothing in the later report or order of October, 1921, to indicate intention on the part of the commission to authorize or permit a change of the one without a like change in the other. The purpose, by exertion of Federal authority to control both, persisted."

We respectfully submit that the last quoted paragraph is based upon a clear *mistake of fact.*

The report of October 27, 1921, clearly expresses in so many words an intention and purpose exactly contrary to that mentioned in the above paragraph of the opinion. It expressly *renounces* any jurisdiction over intrastate rates, not only by way of reparation, but also by way of prescribing or even *approving* rates for the future. The report says (Rec. 74):

> "We are asked to award reparation and to establish reasonable and nonprejudicial rates for the future.

> Except under circumstances not here present, our jurisdiction over intrastate rates is limited to the period of federal control. The complainant in No. 11314 also asks for our approval of reductions in intrastate rates from Chicago Heights, Ill., to Illinois points within the Chicago district, but the period provided by section 208 (a) of the transportation act, 1920, for our exercise of such power has now expired."

The order of the Commission consequently dealt only with interstate rates, as the opinion of this Court recognizes.

When the Commission made this report and entered its order the general increases authorized by the prior order of January 11, 1921, had been in effect for months and the rates considered by the Commission were the rates as increased by that order. Necessarily the Commission had in full mind the order of January 11, 1921, and its effect (Rec. 80). Nevertheless the Commission expressly refused to exercise jurisdiction over the rates in question.

Assuming for the moment that the Interstate Commission had power to deprive the State Commission of all future jurisdiction over state rates, and by the order of January 11, 1921, exercised that power, it is apparent that on October 27, 1921, the Interstate Commission renounced its jurisdiction. That being so, it is clear that the State Commission was again free to exercise its inherent authority over state rates. That inherent authority over state rates was at the most only suspended so long as the Federal Commission exercised its paramount power. As soon as the Federal Commission withdrew its jurisdiction the State Commission's jurisdiction again became operative.

Simpson v. *Shephard* (Minnesota Rate Case), 230 U. S. 352, 402; 57 L. Ed. 1511, 1542; 33 S. Ct. 729.

See also *Board of Railroad Commissioners of the State of North Dakota* v. *Great Northern Ry. Co.*, 281 U. S. 412; 74 L. Ed. 936; 50 S. Ct. 391, in which case the Interstate Commerce Commission, after entering an order in all respects identical with the order of January 11, 1921, insofar as it applied to intrastate rates in North Dakota, afterwards, upon request of the State Commission, renounced its jurisdiction over intrastate rates in North Dakota.

When the Illinois Brick Company filed its petition on October 28, 1922, a year subsequent to the order of October 27, 1921, it found itself in this position: It claimed that it was entitled to reparation because of the exaction of unreasonable rates upon shipments of brick commencing October 28, 1920. Unquestionably it was entitled to have its claim adjudicated in some appropriate forum. In *United States* v. *Louisiana*, 290 U. S. 70, 77; 78 L. Ed. 181, 186, 54 Sup. Ct. 28, this court, in upholding the right of the Interstate Commission to increase rates generally on the basis of a broad finding that the increases, when applied, will generally not exceed a reasonable maximum, pointed out that such action must be "accompanied by suitable reservation of the rights of all interested parties to secure modification of any particular rate which, when challenged, is found to be unjust or unreasonable." The Interstate Commission had renounced jurisdiction over shipments from Bernice. What remedy was left for the Illinois Brick Company except to go to the Illinois Commission?

We respectfully submit, therefore, that the Illinois Commission had jurisdiction to grant reparation upon transportation moving between October 27, 1921, and February 16, 1922, and that the opinion of this court should be modified at least to that extent.

II.

The Court has apparently overlooked its previous decision in the Wisconsin Passenger Rate Case. That case is in conflict with the opinion herein.

The gist of the opinion herein is that the Illinois Commission had no jurisdiction to grant reparation on transportation moving subsequent to the effective date of the order of January 11, 1921, because (the opinion says):

> "By the Interstate Commerce Act and that order, the State was divested of jurisdiction, by specific order, award of reparation or otherwise, to reduce the charges based on the intrastate rates so established."

In effect, the opinion holds that an order of the Interstate Commission under authority of Section 13 (4) of the Interstate Commerce Act requiring state rates to be increased deprives the state authorities of all jurisdiction thereafter over state rates; in other words, that the Interstate Commission has the right, by virtue of Section 13 (4) to take complete unified control over interstate and intrastate commerce, even though no showing is made that the particular state commerce in question in any way affects the general level which the Interstate Commission, acting under Section 15 (a), has found to be fair to interstate commerce.

In the Wisconsin Passenger Rate case (*Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; 66 L. Ed. 371; 42 S. Ct. 232), this Court held exactly the contrary, saying (257 U. S. 590):

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining

> efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and *must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.*" (Italics supplied.)

The situation dealt with by this Court in the Wisconsin Passenger Rate case was identical with the situation in the case at bar, namely, the effect of an order of the Interstate Commerce Commission under Section 13 (4) of the Interstate Commerce Act requiring carriers to increase the general level of state rates to correspond with the increases granted in *Ex Parte* 74 on interstate shipments.

We respectfully ask: What "appropriate discretion" to "deal with intrastate rates" is left to the state authorities under the opinion in the case at bar?

This Court in its opinion herein has not referred to the Wisconsin Passenger Rate case. If the opinion in the case at bar is permitted to stand as written, great confusion will result because of the conflict between the two opinions. Shippers and attorneys will be unable to determine what the law really is.

We respectfully submit that the quoted part of the opinion in the Wisconsin Passenger Rate case should be followed by this Court or expressly overruled.

III.

COSTS OF SUIT.

The opinion of this Court is silent as to allowance of costs. It is respectfully submitted that inasmuch as the Court has found that the respondent is entitled to recover at least a portion of the reparation award, the opinion should be modified so as to require each party to bear its own costs of the proceedings herein.

It is respectfully submitted that for the reasons above stated this Honorable Court should grant a rehearing in the case.

Respectfully submitted,

ABRAHAM R. MILLER,
Counsel for Respondent.

CERTIFICATE OF COUNSEL.

I, Abraham R. Miller, counsel for respondent, Illinois Brick Company, do hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay.

ABRAHAM R. MILLER,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 360.—October Term, 1935.

Pennsylvania Railroad Company, Petitioner, *vs.* Illinois Brick Company.	On Writ of Certiorari to the Appellate Court of the State of Illinois, First District.

[March 2, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

December 31, 1924, respondent sued petitioner and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, called the Panhandle, in the Circuit Court of Cook County, Illinois, to recover reparation awarded by the Illinois Commerce Commission on the ground that they collected from respondent unreasonable and discriminatory charges for intrastate transportation of brick from Bernice, Illinois, to places within the Chicago switching district.[1] January 1, 1921, the Pennsylvania Railroad Company, through lease, obtained control of the Panhandle. The court gave judgment against the Pennsylvania for $44,428.09.[2] That amount includes reparation, interest and attorney's fee. The reparation adjudged is in respect of transportation on the Pennsylvania between October 28, 1920, and February 16, 1922, including that on the Panhandle after acquisition by the Pennsylvania. Petitioner appealed directly to the state supreme court and there sought reversal on the ground that, as later to be specified, the reparation order is repugnant to the Interstate Commerce Act, an order of the Commission and the Constitution of the United States. After hearing argument, that court, being of opinion that the case had been erroneously appealed to it, directed transfer to the appellate court. There the judgment was affirmed; the supreme court denied a writ of certiorari.

First for consideration is a question raised by the answer and decided by the appellate court, the highest court of the State in

[1] Illinois Public Utilities Act, § 72, Laws Illinois, 1921, p. 745.

[2] The case was dismissed as to the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad.

which a decision could be had. 28 U. S. C., § 344 (b). *Chicago, R. I. & Pac. Ry.* v. *Perry*, 259 U. S. 548, 551. *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407. *Minneapolis, &c. R. Co.* v. *Rock*, 279 U. S. 410, 411-412. *C. & O. R. Co.* v. *Mihas*, 280 U. S. 102, 104. That question is whether the Illinois statutes under which the state commission acted and its order awarding respondent reparation are repugnant to the Interstate Commerce Act[3] and the order of the Interstate Commerce Commission[4] providing for the intrastate rates that became effective February 19, 1921, and continued in force until February 16, 1922, in respect of which the state commission made its award.

The Chicago switching district is a large area in and near that city; it extends into Indiana but by far the larger part is in Illinois.[5] A number of railroads including the Pennsylvania and the Panhandle extend into the district and conduct within it transportation of brick and other commodities in intrastate and interstate commerce. There are many brickyards in the district and elsewhere in Illinois. Respondent has several in the district and two at Bernice in Illinois outside, but close to, the district. One

[3] The Interstate Commerce Act (Title 49, U. S. Code) provides:

Section 13 (3). "Whenever . . . there shall be brought in issue any rate . . . . made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding". The paragraph provides for conference and cooperation between the Interstate Commerce Commission and the state authorities."

Section 13 (4). "Whenever . . . the Commission . . . finds that any such rate . . . causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate . . . or the maximum or minimum, or maximum and minimum, thereafter to be charged . . . Such rates . . . shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding".

As it then stood, § 15a (2) provided: "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that the carriers as a whole . . . . will . . . earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country".

[4] Intrastate Rates Within Illinois, 60 I. C. C. 92.

[5] For full description see Switching Rates in Chicago District, 177 I. C. C. 669, 712.

of them is located on the Pennsylvania and the other on the Panhandle.

For a long time prior to federal control of railroads which commenced January 1, 1918, and up to June 25 of that year the rate applicable to interstate and intrastate transportation of brick, by the Pennsylvania and Panhandle respectively, from Bernice into the district and between points within the switching district was 25 cents per ton.

June 25, 1918, the federal railroad administration by General Order No. 28 increased rates on brick by two cents per hundred pounds. November 8, 1918, Freight Rate Authority No. 1887 substituted an increase of 25 per cent. for transportation within the district. These changes operated to make the rate from Bernice into the district 70 cents[6] and that between points within the district 30 cents per ton.

The Transportation Act (of February 28), 1920, § 208 (a), directed that existing rates should obtain until changed by federal or state authority or pursuant to authority of law.

March 10, 1920, respondent complained to the Interstate Commerce Commission that the 70-cent rate was unreasonable and discriminatory. The commission made its report and order October 27, 1921, the pertinent substance of which is given below.

July 29, 1920, the commission authorized increases applicable to interstate traffic of 40 per cent. and 35 per cent. respectively, in eastern and western groups and 33⅓ per cent. on intergroup transportation. *Ex parte 74.*[7] August 10, the Illinois commission authorized a general increase of 33⅓ per cent.[8] August 11, the Interstate Commerce Commission ordered that Illinois territory be treated as within the eastern group for the purpose of applying the authorized increase of 40 per cent. in the rates on interstate traffic between points in that territory.[9]

August 26, rates on intrastate transportation of brick established by the carriers pursuant to authority of the Illinois commission became effective. They were 93½ cents per ton from Bernice into the switching district in Illinois, and 40 cents between Illinois points within the district. October 18, having re-

[6] General Order 28, § 6 provides that 5 cents or more shall be increased to 10 cents. And so here 65 cents became 70 cents.
[7] Increased Rates, 1920, 58 I. C. C. 220.
[8] Docket No. 10,620, 7 Ill. P. U. C. 1047.
[9] Authority to Increase Rates, 58 I. C. C. 302.

gard to the above mentioned order of August 11, the Illinois comsion modified its order of August 10 so as to allow increases of 35 per cent. to be made effective November 15, instead of the 33⅓ per cent. it earlier permitted.[10] Accordingly the intrastate rate from Bernice into the switching district became 94½ cents and the rate between points within the district became 40½ cents.

January 11, 1921, the Interstate Commerce Commission dealing with intrastate rates within Illinois, notified and required carriers to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination which, as specified in the commission's report it found to exist. The order also notified and required the carriers to

"establish, put in force, and maintain rates and charges for freight services . . . . in intrastate commerce within the state of Illinois which shall exceed the rates and charges of the carriers now in force and applicable to such transportation in amounts corresponding to the increases heretofore made by the carriers, now in effect, under Ex Parte 74 . . . . in said carriers' rates and charges for freight services . . . . in interstate commerce within the state of Illinois and between points in the state of Illinois and points in other states in the eastern group, including the Illinois district. It is further ordered, That this order shall become effective on or before the 7th day of March, 1921, upon notice . . . . by not less than five days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and remain in force until the further order of this Commission in the premises".

And the report, which was made a part of the order, stated:

"Some readjustments may be appropriate in individual instances where substantial injury results . . . . Such inequalities as call for readjustment may be brought to our attention in the appropriate way and dealt with as occasion requires . . . . The record establishes that the present intrastate charges for freight services . . . . lower than the just and reasonable corresponding interstate rates and charges authorized in and established in the eastern group, including the Illinois district, pursuant to Ex Parte 74, afford intrastate traffic and shippers and localities within the state undue preference and subject interstate traffic and shippers and localities outside the state to undue prejudice, and unduly, unjustly, and unreasonably discriminate against interstate commerce".[11]

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[10] Docket No. 10,620, 8 Ill. P. U. C. 31.
[11] Intrastate Rates Within Illinois, 60 I. C. C. 92, 103-104.

February 19, 1921, the carriers in accordance with the commission's order put in effect and until February 16, 1922, maintained for intrastate transportation a rate of 98 cents on brick from Bernice into the switching district and a rate of 42 cents between points within the district.

October 27, 1921, the Interstate Commerce Commission, dealing with plaintiff's complaint filed March 10, 1920 found the 70-cent rate on brick in interstate commerce from Bernice into the district was not unreasonable but that it was and for the future would be unduly prejudicial to the extent that it exceeded the rates from points within the district to interstate destinations therein by more than 10 cents per ton. It further found that respondent failed to show itself entitled to damages as the result of the undue prejudice.[12] The commission ordered that the carriers

"cease and desist, on or before February 16, 1922, ... from . . . . collecting for the transportation of common brick in carloads, from Bernice . . . . [and other named points in Illinois and Indiana] to interstate destinations within the Chicago switching district rates which exceed the rates contemporaneously maintained by them on like traffic from points within said district to interstate destinations within said district by more than 10 cents per net ton".

And it ordered the carriers to

"establish, on or before February 16, 1922, upon notice . . . . by not less than 30 days' filing and posting . . . . and thereafter to maintain and apply to the transportation of common brick, in carloads, from Bernice . . . . [and other named points] to interstate destinations within the Chicago switching district rates which shall not exceed the rates contemporaneously maintained by them on like traffic from points within said switching district to interstate destinations within said district by more than 10 cents per net ton".

Then the carriers established and put in force effective February 16, 1922, a rate of 50 cents per ton for intrastate and interstate transportation from Bernice into the switching district and between points within it.

October 28, 1922, respondent applied to the Illinois commission for reparation as to intrastate transportation from Bernice into the switching district. November 7, 1923 the commission dis-

[12] Illinois Brick Co. v. Director General, 64 I. C. C. 273.

missed the claim as to shipments prior to October 28, 1920, as barred by a statute of limitations. The commission found that, at the time the service in question was rendered (October 28, 1920, to February 16, 1922) 50 cents per ton provided adequate revenue for transportation of brick from Bernice to points within the switching district; that to the extent the rates for that transportation exceeded by more than 10 cents per ton the rates contemporaneously applied between points within the district they were unjustly discriminatory and that respondent had been damaged to the extent that the charges collected by the carrier exceeded those that would have been assessed on a rate of 50 cents per ton. And on that basis the commission fixed the amount of its award.[18]

1. To the extent, if at all, that there is conflict between state and federal regulation, the latter must prevail. Unquestionably the Interstate Commerce Commission was authorized directly to prescribe, or to require the carriers to establish and maintain, intrastate rates to prevent or remove discrimination against interstate commerce or to make intrastate transportation yield its just proportion of the carriers' earnings. *Florida* v. *United States,* 282 U. S. 194, 210. *Commission* v. *Texas & N. O. R. Co.,* 284 U. S. 125, 131. *Florida* v. *United States,* 292 U. S. 1, 4. During the period between February 19, 1921, and February 16, 1922, the intrastate rates in force for transportation of brick by petitioner's railroad from Bernice into the switching district were maintained by petitioner pursuant to and in accordance with the Interstate Commerce Commission's order of January 11, 1921. By that order the commission "notified and required" carriers to cease the prejudice and discrimination against interstate commerce resulting from the application of their intrastate rates in force and also "notified and required" them to increase their intrastate rates and to make them correspond with the interstate rates theretofore increased in pursuance of its order in *Ex parte 74.* The commission's direction to the carriers that they collect charges based on the intrastate rates required by its order was not less mandatory than was its direction to cease prejudice and discrimination. In order that the prescribed equality between intrastate and corresponding interstate rates should not be disturbed by state authority or by action of the carriers, the commission declared that the order—and neces-

[18] Docket No. 12,765, 3 Ill. C. C. 165, 300.

sarily the rates directed—should continue in force until changed by it.

And, anticipating possible need for further action, the commission expressly suggested that individual instances of inequalities be brought to its attention for correction. Although respondent's complaint against the 70-cent rate established by Freight Rate Authority No. 1887 was still pending, the record discloses no application by respondent to amend or enlarge the scope of the complaint or any effort to have reduced the 98-cent rate directed by the Interstate Commerce Commission, or to have corrected the inequality resulting from its order of January 11, 1921. There is no suggestion that the intrastate rates in respect of which the Illinois commission awarded reparation were not made in obedience to and in strict accordance with the order of the Interstate Commerce Commission. Save as the rate so prescribed might be dealt with under federal law, the carriers were bound to collect the charges based upon them. By the Interstate Commerce Act and that order, the State was divested of jurisdiction, by specific order, award of reparation or otherwise, to reduce the charges based on the intrastate rates so established. The order of the Illinois commission, in so far as it awards reparation in respect of transportation covered by rates that petitioner was required to put in force and maintain by the Interstate Commerce Commission's order of January 11, 1921, is plainly repugnant to the Interstate Commerce Act and to that order. To the extent, therefore, that the judgment depends on that part of the award, it is without foundation and cannot be sustained.

2. Under the Interstate Commerce Commission's order of October 27, 1921, petitioner was free, upon the prescribed notice of 30 days, though not required before February 16, 1922, to reduce to not to exceed ten cents the differential between the interstate rate from Bernice into the switching district and that for interstate transportation between points within the district. That order dealt only with interstate rates. But the order of January 11, 1921, established the rule of equality between rates for interstate and intrastate transportation from Bernice into the district and also for transportation between points within the district. On the facts found by the Interstate Commerce Commission and the law as applied by it, petitioner was required to maintain equality between

these intrastate and interstate rates. There is nothing in the later report or order of October, 1921, to indicate intention on the part of the commission to authorize or permit a change of the one without a like change in the other. The purpose, by exertion of federal authority to control both, persisted. The state commission was not, at any time after the intrastate rates were established under federal authority, authorized to condemn them or to award reparation in respect of transportation to which they applied. By the order of October 27, 1921, requiring adjustment of the interstate rates upon 30 days' notice on or before February 16, 1922, the commission impliedly found that the time allowed was necessary to enable the carriers to compute the rates, prepare the schedules and post them as required by law. There is no support for a claim that, as to transportation in the part of the period between the order October 27, 1921, and February 16, 1922, the Illinois commission had jurisdiction to grant reparation.

3. There remains for consideration the part of the judgment that is based on the award made in respect of transportation between the earliest date within the period fixed by the statute of limitations, October 28, 1920, and the effective date of the commission's order, February 19, 1921. The intrastate rates in effect during that time were made under authority of the State acting through its commission and pursuant to the above mentioned orders of the latter August 10, 1920, authorizing 33⅓ per cent. increase and October 18, 1920, making the increase 35 per cent. The rates so increased superseded the 70-cent rate made by the carrier while under federal control. The state's jurisdiction as to them was untrammeled by any order of the Interstate Commerce Commission or other exertion of federal power. The reparation order, so far as it relates to that service, must be sustained unless found repugnant to the due process clause of the Fourteenth Amendment to, or the commerce clause of, the Federal Constitution.

No such question was, by answer, motion or otherwise, expressly raised in the trial court. Petitioner makes no claim that the reparation order was specifically challenged in the trial court as repugnant to either of these clauses, asserts that it was not necessary so to do and maintains that, at the trial, there was by petitioner sufficiently drawn in question the validity of the order on the ground of its being repugnant to these provisions. The sole support for that claim is this: Respondent put in evidence the state

commission's reparation order and the record on which it was based. In defense petitioner introduced the same record and the state commission's rate orders authorizing respectively 93½ cents and 94½ cents per ton for transportation from Bernice into the switching district.

Plainly that was not enough. The Illinois statute requires that in cases involving construction of the Federal Constitution appeals from circuit courts shall be taken directly to the supreme court.[14] And, as definitely shown by its decisions, that court will not take jurisdiction unless it appears from the record that the constitutional question was urged in the lower court, the ruling on it preserved in the record and the error assigned on appeal.[15] While the order of that court transferring the case does not specify the grounds on which it was based, the petitioner states that the supreme court necessarily held the constitutional questions had not been properly raised and that, on the oral argument, the chief justice stated that the transfer would be made because of petitioner's failure properly to raise and preserve the constitutional questions. The appellate court so understood the grounds and effect of the order and held that by transferring the case the supreme court eliminated the constitutional questions. As the highest court of the State declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them. *Chicago, Indianapolis, &c. Ry. Co.* v. *McGuire,* 196 U. S. 128, 131. *Hulbert* v. *Chicago,* 202 U. S. 275. *Cox* v. *Texas,* 202 U. S. 446, 452. *Louisville & Nashville R. R.* v. *Woodford,* 234 U. S. 46, 51.

4. Petitioner's application for this writ suggests that, by a construction contrary to that theretofore put upon § 68 of the Illinois Public Utilities Act it was denied an opportunity to be heard on the question whether the evidence before the Illinois commission was sufficient to sustain the reparation award. And upon that basis petitioner claims that there is here presented

[14] Practice Act of 1907, § 118, Laws 1907, p. 443, repealed and replaced by Civil Practice Act of June 23, 1933, §§ 75, 94, effective January 1, 1934, Laws 1933, pp. 805, 811. Smith-Hurd Rev. Stats. 1935, c. 110, §§ 199, 218. Van Dyke *v.* Illinois Com. Men's Ass'n, 358 Ill. 458, 464. Central Union Co. *v.* Edwardsville, 269 U. S. 190, 194.

[15] Foreman-State Nat. Bank *v.* Sistek, 358 Ill. 525, 529-530. Hoffman *v.* Sears Community Bank, 356 Ill. 598, 601. Albrecht *v.* Omphghent Township, 324 Ill. 200, 202.

the question whether by denial of hearing it was deprived of property without due process of law. But, as is shown by the opinion of the appellate court, it did hear petitioner and respondent on that question and decided it in favor of the latter. There is no foundation for petitioner's claim that it was denied hearing.

The judgment below will be reversed and the case remanded with directions for proceedings not inconsistent with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.